

No. 22604

In the  
United States Court of Appeals  
*For the Ninth Circuit*

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MATSON NAVIGATION COMPANY,

*Petitioner,*

vs.

FEDERAL MARITIME COMMISSION and UNITED  
STATES OF AMERICA,

*Respondents.*

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Brief of Petitioner  
Matson Navigation Company

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**Brief of Petitioner**  
**Matson Navigation Company**

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**STATEMENT**

**I. Jurisdiction of the Court.**

On February 14, 1968, Matson Navigation Company (Matson) filed its petition in this Court to review an order of the Federal Maritime Commission (the Commission). The order was purportedly issued pursuant to Sections 15 and 22 of the Shipping Act, 1916 (the Act), 39 Stat. 733, 46 U.S.C. §§ 814, 821. (The text of Section 15, as amended, is set forth in full at Appendix A.) This Court has jurisdiction and venue pursuant to 28 U.S.C. §§ 2342(3) and 2343.

## II. The Proceedings.

On August 3, 1966, the Commission instituted an investigation for the purpose of determining whether it has jurisdiction pursuant to Section 15 of the Act respecting an agreement to merge among three common carriers by water, American Mail Line Ltd. (AML), American President Lines, Ltd. (APL) and Pacific Far East Lines, Inc. (PFEL), and, if so, whether the agreement should be approved, disapproved or modified (R.D. 1).<sup>1</sup> The agreement, denominated Agreement No. 9551 by the Commission, provides, *inter alia*, that the parties agree to merge or consolidate "in the form and by the procedures as the directors and shareholders of the three companies should approve" and that the three companies shall form planning groups for the purposes of planning the merger and coordinating operations of the three companies pending merger (R. Ex. 14, pp. 2-4).

Section 15 of the Act provides that all agreements, understandings and arrangements between or among common carriers by water and all modifications or cancellations thereof having certain enumerated effects upon rates and service; regulating, preventing or destroying competition; "or in any manner providing for an exclusive, preferential or cooperative working arrangement" must be filed with the Commission. The Commission must then, after notice and hearing, disapprove, cancel or modify any such agreement, understanding or other arrangement which it finds unjustly discriminatory or unfair among carriers or shippers, or operates to the detriment of the U. S. foreign commerce, or is "contrary to the public interest." The effectuation of any agreement within Section 15 is unlawful until approved by the Commission, and the Commission's approval exempts an agreement from challenge under the antitrust laws of the United States. (46 U.S.C. § 814.)

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1. All record references are in accordance with the designation of documents contained in the Commission's certification of record filed herein on March 14, 1968. The documents numbered 1 through 45 in the certificate are cited by document number and page(s) (*e.g.*, R. D. 1, p. 1), the transcript of oral evidence below is cited by the transcript page(s) (*e.g.*, R. Tr. 1-10), and exhibits below are cited by exhibit number and page(s) (*e.g.*, R. Ex. 1, p. 1).

Each of the three parties to Agreement No. 9551 is a common carrier by water within the meaning of Section 1 of the Act (46 U.S.C. § 801) and receives operating differential subsidy (ODS) from the United States Government to operate dry cargo vessels, among other places, between ports on the United States Pacific Coast and ports in the Far East. In addition, PFEL operates an unsubsidized service between U.S. Pacific Coast ports and Guam, APL operates three subsidized trans-Pacific passenger vessels, and APL has recently announced its intention to acquire a controlling interest in a new steamship company which will operate in the California-Hawaii domestic trade. The combined fleets of APL, PFEL and AML total 45 cargo vessels and 3 passenger vessels. At the present time some 13 vessels are being constructed for the three lines under construction differential subsidy (CDS) contracts for operation in the subsidized trades. (R.D. 43, pp. 7-9; Ex. 91; Ex. 41, p. 4; Ex. 43 C; Ex. 143; Tr. 356-59, 791-92.) Upon consummation of the merger, the emerging company would have by far the largest fleet of subsidized vessels operating in the Pacific under the United States flag and would be one of the two largest subsidized United States flag operators (R.D. 43, App. I; Ex. 65; Tr. 91-92, 1004-06).

At the present time, effective control of the three merger applicants rests with Natomas Company (Natomas) and its principal stockholder, Mr. Ralph K. Davies. APL owns 93% of AML's outstanding stock. APL, in turn, is owned 51% by Natomas. Mr. Davies is Chairman of the Board of Natomas and Chairman of the Board of APL. Mr. Davies, AML and Natomas together own 45% of PFEL's outstanding stock. When the merger is consummated, Mr. Davies and Natomas expect to control the merged company. (R.D. 43, p. 5; Ex. 2; Tr. 49-51, 57-58.)

The program of acquisition that resulted in the present single control of the three merger applicants commenced shortly after World War II when Mr. Davies acquired a small block of APL stock, some 90% of which was then held by the United States Government, and was elected a director of APL. In 1952, Mr.

Davies formed American President Lines Associates, which then, together with Signal Oil Company, acquired all the Government's stock in APL. In 1954 APL acquired about  $\frac{2}{3}$  of the outstanding stock of AML. In 1956 American President Lines Associates was merged into Natomas, and Mr. Davies was elected Chairman of the Board of Natomas. Shortly thereafter, Natomas purchased a block of 29% of PFEL's outstanding stock. In 1960, APL, AML and PFEL entered into and filed with the Commission a Section 15 agreement (Agreement No. 8485) which authorized them to form a coordinating committee for the purpose of eliminating certain types of competition among the three lines. Between 1954 and 1966 Mr. Davies and Natomas pursued a policy of acquiring PFEL stock and APL pursued a policy of acquiring AML stock until, by 1966, the present ownership relations resulted. (R.D. 43, pp. 3-4; Tr. 6-12, 93-96; Exs. 2, 49.)

Matson Navigation Company (Matson) and States Steamship Company (States) were denominated "petitioners" in the proceedings below by the Commission's order of investigation (R.D. 1). Hearing Counsel, an employee of the Commission, participated in the proceedings as a party on behalf of the general public as provided by the Commission's Rules of Practice and Procedure (46 C.F.R. § 502.42). The United States Department of Justice (Justice) intervened for the purpose of presenting its contentions on the question of whether the Commission has jurisdiction over mergers among common carriers by water pursuant to Section 15 of the Shipping Act. (R.D. 17, 19.)

Matson is a common carrier by water operating unsubsidized passenger and cargo services in the California-Hawaii offshore domestic trade, and, since the early fall of 1967, it has operated an unsubsidized cargo containership service in the California-Far East trade. (R. Exs. 139, 142, 151, 152; Tr. 1656-1665, 1704-1709, 1718.) States is a common carrier by water operating subsidized cargo vessels between the United States Pacific Coast and the Far East, some of which make intermediate calls at Hawaii. (R.D. 43, pp. 19-20; Tr. 1745.)

Matson, States, Hearing Counsel and Justice all took the position before the Examiner and the Commission that the Commission is without statutory authority under Section 15 of the Shipping Act to consider, approve and exempt from the antitrust laws mergers between common carriers by water.<sup>2</sup> States and Matson further contended that Agreement No. 9551 is insufficient as a merger agreement and should be disapproved in any event because the merger applicants had failed to justify the merger as necessary to meet an urgent transportation need or confer an important public benefit. Hearing Counsel initially urged that the merger should be approved if the Commission found it had jurisdiction, but subsequently receded from that position, urging that the record was insufficient to support approval (R. D. 39, p. 4). Justice took no position respecting the "merits" of the case if the Commission be held to have jurisdiction.

Hearings were held before an Examiner of the Commission in November and December of 1966. On May 18, 1967, the Examiner issued his initial decision, in which he upheld the position of the merger applicants in virtually all respects. Exceptions to the initial decision were duly filed by Matson, States, Hearing Counsel and Justice, and oral argument was had before the full Commission on July 24, 1967.

On October 3, 1967, the Commission served its Report and Order. The Report consisted of four separate opinions and the Order remanded the case to the Examiner for further proceedings. (R. D. 36, 37.) One opinion, joined in by Commissioners Harllee and Barrett, held that the Commission has jurisdiction to approve Agreement No. 9551 as a merger agreement and to immunize the merger from the antitrust laws; and, while asserting the present record "affords a sufficient basis" for action (R.D. 36, p. 18), joined in remanding the case for the taking of further evidence in accordance with the opinion of Commissioner Hearn.

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2. Matson also contended that the merger planning aspects of the agreement are subject to Section 15, though the agreement to merge, itself, is not.

Commissioner Hearn concurred in the opinion of Commissioners Harllee and Barrett on the jurisdictional question, but held that Agreement No. 9551 is "deficient as a matter of law" and should be remanded for the taking of further evidence on several specific matters. Commissioners Day and Fanseen, in separate opinions, held that the Commission has no jurisdiction over mergers. (R.D. 36, pp. 24, 28, 30.)

Before any further hearing could be held, the merger applicants petitioned the Commission to reconsider its decision and order of remand, which petition was granted November 17, 1967 (R. D. 42). On December 26, 1967, the Commission issued its Supplemental Report on Reconsideration and Order (R. D. 43). Again four separate opinions were written. Commissioners Harllee and Barrett rescinded their votes for remand and issued an opinion on the "merits", which merely republished the applicable portions of the Examiner's decision, approving the agreement in all respects. Commissioner Fanseen, though maintaining his position that the Commission does not have jurisdiction, concurred in the second Harllee-Barrett opinion "in the interest of maintaining the integrity of the administrative process" (R. D. 43, p. 46). Commissioner Hearn maintained his previous position that the agreement and the record are insufficient for approval under Section 15, again specifying the areas in which the record is deficient. Commissioner Day reaffirmed his position that the Commission does not have Section 15 jurisdiction respecting mergers and declined to join in the controversy on the merits.

### **III. Specifications of Error.**

1. The Commission erred in concluding that it has jurisdiction pursuant to Section 15 of the Act to approve Agreement No. 9551 as a merger agreement with the consequence of conferring anti-trust immunity on the agreement and the contemplated merger.

2. If, contrary to Matson's contention, the Commission does have such jurisdiction, its purported approval of the agreement was erroneous. The Commission (a) failed to require the appli-

cants to bear the burden of establishing that the merger is justified by an urgent transportation need or the achievement of an important public benefit; (b) erroneously assessed the applicable standards in that the Commission failed adequately to appraise the anti-competitive nature of the merger and its consequent conflict with antitrust policy and, in this connection, relied upon impermissible grounds to mitigate the effects of this merger; (c) failed to make requisite findings of transportation need or public benefit; and (d) failed to require the applicant to produce a plan for merger and the information essential to a full appraisal of their proposal.

### SUMMARY OF ARGUMENT

1. The Commission has, for the first time, clearly asserted jurisdiction under Section 15 of the Act to approve and clothe with antitrust immunity all mergers among United States-owned common carriers brought about by agreement. This construction leaves mergers other than by agreement and mergers among foreign-owned companies beyond the scope of the Commission's jurisdiction. The Commission's assertion of jurisdiction over mergers is erroneous for a number of reasons.

a. The language of Section 15 does not expressly confer jurisdiction to approve mergers. When the language of Section 15 is read as a whole, its intention to regulate continuing working arrangements among carriers clearly emerges. By reading the phrase "controlling, regulating, preventing or destroying competition" out of context, the Commission has *implied* a merger jurisdiction.

b. In enacting Section 15, Congress was concerned about prevalent abuse of cooperative agreements in the international shipping industry serving this nation's foreign commerce. Congress rejected the idea of prohibiting such agreements because it would lead to: (i) rate wars and elimination of the weak by the strong carriers and (ii) consolidation through common ownership. Congress concluded that the latter results could not be prevented by legislation. Congress therefore provided Governmental regulation

and antitrust immunity for the existing types of working arrangements among all carriers serving our foreign commerce, and mergers were obviously not so included.

c. The Commission's construction of Section 15 is contrary to the Supreme Court doctrine that repeal of the antitrust laws by implication is not favored.

d. Other regulatory agencies with power to approve mergers and impart antitrust immunity thereto have been given express authority with specific statutory standards for approval of mergers and power to order divestiture after approval.

e. For the Commission to exercise jurisdiction over mergers by agreement but not to exercise jurisdiction respecting mergers by stock acquisition or mergers among foreign-owned companies would be contrary to sound public administration and the public interest.

2. If the Commission does have merger jurisdiction over Agreement No. 9551, the Commission could not properly approve the agreement and the merger on the basis of the record before it.

a. It is well settled that the burden is upon an applicant for Section 15 approval of an anticompetitive arrangement to establish that it is justified by an urgent transportation need or an important public benefit. Merger agreements among competing carriers are as anticompetitive as other arrangements routinely subjected to Section 15 scrutiny. The Commission must require as strong a showing from the merger applicants as it would for any other anticompetitive arrangement. Inasmuch as merger effectively ends competition among the companies involved, there are a number of additional problems and policy considerations that the Commission must assess in deciding whether to approve a merger.

b. The Commission did not believe it necessary to require the applicants to establish that their merger is necessary to secure important public benefits or is based upon a serious transportation need.

(i) The Commission suggests that the burden of establishing justification for anticompetitive agreements applies only in the case of *per se* violations of the antitrust law, but it does not

determine what degree of concentration would result in the relevant service market from the merger; irrationally rejects U. S. liner carriage as a relevant service market; and ignores its own precedents in formulating and applying this new rule.

(ii) The Commission then purports to balance a number of factors against unresolved anticompetitive effects of the merger. It finds support in the regulated nature of the shipping industry, citing ICC cases as analagous, but fails to note that it does not have the extensive regulatory powers in the foreign trade that the ICC exercises respecting the carriers whose mergers it regulates. Various considerations of U. S. flag carrier promotion in competition with foreign operators and financial benefits to applicants' stockholders are relied upon, but the Commission then admits that promotion of the American Merchant Marine is not its proper concern. Finally, the Commission refers to the fact that all three merger applicants are presently controlled by Natomas Company, regarding that as mitigating the anticompetitive effect of the merger, without regard to the antitrust immunity its approval would impart to such concentration.

c. The principal justifications the Commission finds for the merger are financial benefits to be effectuated by eliminating redundant personnel and achieving operational efficiencies of various kinds. There is no finding, however, that the various financial benefits and efficiencies are required for the applicants to continue as highly effective and prosperous steamship operators, fully capable of developing their respective fleets and services.

d. The Commission issued its approval of applicants' merger without any evidence of the form which the merger would take, terms of agreement governing the consolidation transaction, plans for operation of the consolidated enterprise, plans for protection of displaced employees and the impact of the merger upon subsidy recapture and the public interest. The Commission must require a full disclosure of the applicants' entire merger plans before approving a merger.

## ARGUMENT

### I. The Commission Erred in Concluding It Has Section 15 Jurisdiction Respecting Agreement No. 9551 as a Merger Agreement.

#### A. THE COMMISSION'S DECISION CREATES AN INCOMPLETE AND ATTENUATED MERGER JURISDICTION.

It is important to note at the outset precisely what the Commission regards its jurisdiction respecting mergers<sup>3</sup> to be. The decision does not hold that the Commission has jurisdiction over *all* mergers involving two or more carriers subject to the statute it administers. Rather, it holds that only those mergers brought about by *agreements* between two or more common carriers by water or other persons subject to the Act are within this Commission's purview.<sup>4</sup> Thus, virtually all stock acquisitions of control, and any other merger form that can be accomplished unilaterally or without an agreement would be outside the Commission's purview.<sup>5</sup> Further, the Commission holds that its jurisdiction over merger agreements is limited to steamship companies

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3. We use the term "merger" in its generic sense to include the acquisition by one corporation of control over the business of another by stock acquisition, asset acquisition, statutory merger or otherwise. This definition is much broader than the term "merger" when used in its technical sense to connote a specific form of consolidation. *United States v. Philadelphia National Bank*, 374 U.S. 321, 335-42 (1963).

4. Section 1 of the Shipping Act, 1916 (46 U.S.C. § 801) provides, in part:

"The term 'common carrier by water' means a common carrier by water in foreign commerce or a common carrier by water in interstate commerce on the high seas or the Great Lakes on regular routes from port to port.

"The term 'other persons subject to this act' means any person not included in the term 'common carrier by water', carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water."

Section 15 jurisdiction extends only to agreements among common carriers by water and other persons subject to the Act.

5. The gap in the Commission's jurisdiction over stock acquisitions is particularly pertinent here. Applicants have not committed themselves to a final form of merger (see pp. 69-70, *infra*) and might consummate the merger through stock acquisition from persons not subject to the Act

owned by citizens of the United States (United States-owned) and does not extend to foreign-owned steamship companies serving this nation's commerce (R.D. 36, pp. 8, 10).

The merger jurisdiction with its attendant power to confer antitrust immunity carved by the Commission thus contains enormous gaps. This, in itself, might not be a reason for rejecting the Commission's analysis if there were good reasons for providing Commission regulation in an area not otherwise under Government scrutiny or if there was compelling evidence that Congress intended for the Commission to exercise a somewhat attenuated merger jurisdiction. But this is not the case. Congress has provided through the medium of the antitrust laws a comprehensive scheme for Governmental control and regulation of mergers, and the Supreme Court has with increasing regularity given a broad sweep to the antitrust statutes and narrowly construed seemingly conflicting jurisdiction of regulatory agencies. Moreover, the available guides to congressional intent, rather than evidencing a purpose to clothe the Commission with jurisdiction to confer antitrust immunity upon the mergers of United States-owned steamship companies, establish an intent to fashion a regulatory scheme that would discourage consolidation of ownership among competing steamship lines and would be applicable alike to foreign and United States-owned steamship companies.

It will be seen that the Commission relies almost exclusively upon what it perceives to be the "plain language" of Section 15 for creation of its merger jurisdiction. Rather than relying on the other commonly accepted guides to statutory interpretation, the Commission's decision provides a series of rationalizations for ignoring their guidance. In the final analysis, the Commission is satisfied to conclude that "neither the language of section 15

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and liquidation, rendering their "agreement to merge" mere window dressing which qualifies as a Section 15 agreement to obtain antitrust immunity. This is underscored by the present 93% APL ownership of AML, which may be unilaterally merged into APL (R.D. 43, p. 42). The 93% of AML stock was evidently acquired from persons not subject to the Act, and in fact was accomplished without Section 15 proceedings or approval. (R. Tr. 59-60.)

nor its legislative history show that Congress did not intend section 15 to cover agreements to merge" (R.D. 36, p. 12). The Commission has found nothing to show that Congress affirmatively intended to include mergers under Section 15.

As we now discuss in more detail, the Commission's jurisdictional conclusion does not have a reasoned basis in the statute or otherwise. It thus becomes the duty of this Court to set the Commission on its proper regulatory course.

#### **B. THE PLAIN LANGUAGE OF SECTION 15 DOES NOT EXTEND TO MERGERS.**

According to the Commission "an agreement to merge, since it eliminates all competition between the parties to the merger, is within the literal language" of that portion of Section 15 which requires the filing and approval of any agreement among common carrier by water "controlling, regulating, preventing or destroying competition" (R.D. 36, p. 5). We think this is quite demonstrably not the case, and we agree with dissenting Commissioners Day and Fansen that the language of Section 15 does not extend to mergers either expressly or impliedly (R.D. 36, pp. 28, 31). This becomes apparent when, instead of isolating one phrase out of context, Section 15 is considered as a whole, which is the proper method of construing any statutory language. *Federal Power Commission v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 514 (1949).

(1) Section 15 enumerates seven kinds of agreements that fall within the Commission's jurisdiction.<sup>6</sup> Not one of these seven

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6. The first paragraph of Section 15 reads in pertinent part as follows: "That every common carrier by water . . . shall file immediately with the Commission . . . every agreement with another such carrier . . . [1] fixing or regulating transportation rates or fares; [2] giving or receiving special rates, accommodations, or other special privileges or advantages; [3] controlling, regulating, preventing or destroying competition; [4] pooling or apportioning earnings, losses, or traffic; [5] allotting ports or restricting or otherwise regulating the number and character of sailings between ports; [6] limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; [7] or in any manner providing for an exclusive, preferential or cooperative working arrangement." (Bracketed numbers added.)

categories expressly refers to agreements for the combination or merger of steamship companies or for the acquisition of stock or assets of one by another. Indeed, the Commission concedes this and admits at a later point in its decision that "some implication is admittedly involved" in its conclusion that the plain language of Section 15 extends to mergers (R.D. 36, p. 18).

(2) The language of Section 15 extends to foreign-owned common carriers as well as to United States-owned carriers serving this nation's foreign commerce. Yet, the Commission construes its merger jurisdiction as extending only to United States-owned carriers (R.D. 36, p. 8), while its jurisdiction respecting all other types of Section 15 agreements among carriers extends to both foreign and United States-owned carriers. If any merger agreements fit within the plain language of Section 15, then all merger agreements do. To suggest that some do and some do not certainly raises grave questions about the plain language.<sup>7</sup>

(3) Of the first six categories of agreements enumerated in Section 15, five refer to specific types of agreements which could only encompass continuing working arrangements, and the seventh phrase is a catch-all referring to agreements "*or in any manner* providing for an exclusive, preferential, or cooperative working arrangement." (Emphasis ours.) We think this language quite clearly characterizes the first six types of agreements. (See pp. 31-32, *infra*.)

(4) The second paragraph of Section 15, first sentence, explicitly obligates the Commission to maintain a continuing supervision over all Section 15 agreements, whether or not previously

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7. It is no answer that Section 17 literally directs the Commission to regulate practices at foreign terminals but no such regulation has ever been attempted (R. D. 36, p. 8). No one argues here that Section 17 does not clearly provide for the Commission to regulate terminal practices, and its application to foreign terminals is beyond the issues in this proceeding. What is presented by Section 15 is the question of whether "implication" of United States-owned companies merger jurisdiction, where merger jurisdiction is *not* specifically provided for, can be read into a scheme of regulation otherwise directed at foreign and United States-owned carriers alike.

approved.<sup>8</sup> It is quite obviously impossible to maintain continuing supervision over a merger agreement, and the Commission has no power, as do other agencies, to order the dissolution of a merger through enforcement of Section 11 of the Clayton Act (15 U.S.C. § 21) or otherwise.<sup>9</sup>

**C. COMMISSION JURISDICTION OVER MERGER AGREEMENTS WOULD BE CONTRARY TO THE PURPOSE OF SECTION 15.**

If there was any doubt about the language of Section 15, it is clear from the legislative history that its purpose was to regulate the exercise of monopoly power by steamship companies through conference agreements and working arrangements of various kinds prevalent in the international steamship industry serving this nation's foreign commerce. Congress did not intend to undertake direct control of monopoly power created by amalgamation of ownership among steamship companies.

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8. *Empire State Highway Transportation Ass'n. v. FMB*, 291 F.2d 336, 339 (D.C. Cir. 1961), *certiorari denied*, 368 U.S. 931 (1961); *Mediterranean Pools Investigation*, 9 F.M.C. 264, 292 (1966); *Associated Banning Co. v. Matson Navigation Co.*, 5 F.M.B. 336, 341-45 (1956). Pursuant to that duty the Commission's predecessor has refused to approve a covenant not to compete of indefinite duration. *Matson-Dollar Agreements*, 1 U.S.M.C. 750, 754-55 (1938).

9. See pp. 36-37, *infra*. The Commission asserts "it does not follow, of course, that our approval of the agreement once granted can never be withdrawn or that we cannot order the agreement modified. Just what the consequences of such an action would be are not before us now . . . ." (R. D. 36, pp. 11-12.) We submit that once a merger is consummated pursuant to an agreement approved by the Commission, withdrawal of approval would be meaningless in the absence of power to order divestiture, which the Commission concedes it does not have (R. D. 36, p. 12). Further, the consequences of such action were before the Commission in determining whether merger agreements fit within the plain language of a statute requiring the Commission to maintain continuing supervision of all agreements approved. A reasoned consideration of this facet of Section 15 jurisdiction over mergers is implicit in the Commission's duty to find a "reasonable basis in the law" for a statutory construction which belies the congressional purpose to "insure that . . . immunity from the antitrust laws will be subject to careful control." *Federal Maritime Commission v. Aktiebolaget Svenska Amerika Linien*, 36 U.S.L.W. 4213, 4214-15 (U.S. March 6, 1968).

### 1. The Alexander Report.

In 1913 the House Committee on Merchant Marine and Fisheries, of which Representative J. W. Alexander was Chairman, undertook an extensive investigation into the practices of steamship conferences. At the time, there were several cases pending against foreign and domestic steamship companies for alleged violation of the Sherman Act.<sup>10</sup> The findings and recommendations of the Committee are set forth in its report, known as the Alexander Report, and were adopted by Congress in enacting the Shipping Act, 1916.<sup>11</sup>

The Alexander Report described at some length the various anticompetitive operating arrangements which had grown up in the international shipping community. The report found that "as regards nearly every foreign trade route, practically all the established lines operating to and from American ports work in harmonious cooperation, either through written or oral agreements, conference arrangements, or gentlemen's understandings." (H.R. Doc. No. 805, 63d Cong. 2d Sess. 281 (1914).) The report then discussed under separate headings several different types of agreements that were prevalent. These types of agreements are strikingly similar to and the undoubted source of those enumerated in the first paragraph of Section 15. It is worth noting that merger agreements are not among those enumerated in this part of the Alexander Report.<sup>12</sup>

The Committee found that there were many predatory practices arising from such arrangements. Nevertheless, the Committee

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10. See e.g. *United States v. Pacific & Arctic Co.*, 228 U.S. 87 (1913); *Thomsen v. Union Castle Mail S.S. Co.*, 166 Fed. 251 (2d Cir. 1908), *affirmed* *Thomsen v. Cayser*, 243 U.S. 66 (1917).

11. For an authoritative discussion of the Alexander Report and its background, see *Federal Maritime Board v. Isbrandtsen Co.*, 356 U.S. 481, 488-90 (1958).

12. At pages 282-286 of the Alexander Report the devices commonly used to regulate competition among foreign commerce carriers were enumerated. The implication is strong that agreements to regulate competition between lines or conferences where trade routes intersect or adjoin and conference members' covenants not to compete independently with the con-

recommended against a flat prohibition of such agreements because restoration of unrestricted competition would lead to two greater evils, and one of the two greater evils was corporate consolidation through common ownership. The Committee stated its conclusion as follows:

"To terminate existing agreements would necessarily bring about one of two results: the lines would either engage in rate wars which would mean the elimination of the weak and the survival of the strong, or, to avoid a costly struggle they would consolidate through common ownership. Neither result can be prevented by legislation, and either would mean a monopoly fully as effective, and it is believed more so, than can exist by virtue of an agreement." (*Id.* at 416).<sup>13</sup>

It seems apparent that the foregoing quotation refers to three evils: (1) monopoly power achieved by agreement among carriers, (2) monopoly power achieved by consolidation among carriers, and (3) monopoly power achieved by large carriers as the end result of rate wars. The Alexander Committee concluded that the type of monopoly power achieved by agreement, being susceptible to continuing regulation by public authority, was less inimical to the public interest than monopoly power achieved through consolidation or by eliminating the weak carriers through rate wars. The Committee therefore recommended to Congress that the United States undertake to regulate agreements among carriers and exempt those agreements from the antitrust laws with the hope of forestalling the greater evils of rate wars and consolidation of ownership among competing carriers.

It is possible to speculate why Congress did not believe it could successfully prevent rate wars and mergers among carriers

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ference trade, enforced by a cash deposit with the conference, were the devices which correlate with the "controlling, regulating, preventing or destroying competition" standard finally included in Section 15. The other devices were rate agreements; traffic apportionment by sailings and port allotments; maximum freight volume limitations; and freight revenue pools.

13. The Supreme Court has very recently referred to this part of the Alexander Report as the "genesis of the Shipping Act." *Volkswagenwerk A.G. v. FMC*, 36 U.S.L.W. 4197, 4201 (U.S. March 6, 1968).

in the international shipping community by regulatory legislation. However, the significant points here are that Congress clearly regarded them as separate problems, that Congress did expressly undertake to regulate agreements, and that Congress did not expressly undertake to regulate corporate consolidations or minimum rates.

It must be borne in mind that the same Congress that issued the Alexander Report also enacted the Clayton Act, *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213, 218 (1966), and had specifically taken steps in Section 7 of the Clayton Act (38 Stat. 730) to deal with mergers by prohibiting consolidation of corporate control through stock acquisitions, the form of merger then most prevalent, tending substantially to lessen competition. If Congress had wished to include merger jurisdiction in Section 15, it seems only reasonable that it would have used specific language similar to that used in Section 7 of the Clayton Act.<sup>14</sup> Indeed, as we have seen, the Alexander Committee itself referred to the problem of mergers among steamship companies serving the foreign commerce of the United States. In doing so, it characterized mergers as being a separate problem from agreements, stating that "*In addition to the combinations by agreement there are numerous instances of consolidations among steamship lines by actual amalgamation or through stock control of subsidiaries*" (*Id.* at 301, emphasis ours).

It also seems worthy to note that the great majority of the steamship companies serving the United States foreign commerce in 1914 were foreign-owned companies (*Id.* at 59-60, 91, 110-

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14. The Commission reasons (R.D. 36, pp. 10-11) that Section 7 of the Clayton Act governed control by stock acquisition, the Sherman Act governed merger by agreement, and somehow application of Section 15 to mergers by agreement is consistent with this scheme. This reasoning would compel the conclusion that Section 15 was enacted to exempt mergers by agreement from the less restrictive prohibitions of the Sherman Act but left control by stock acquisition subject to the more severe prohibitions of Section 7 of the Clayton Act. Such an illogical intention and result are, of course, very persuasive reasons for construing the statute as having left all mergers subject to regulation by the Sherman and Clayton Acts.

111, 154-155) and that the principal consolidation problems noted by the Committee were among foreign-owned lines (*Id.* at 301; R.D. 36, p. 7). The primacy of foreign-owned carriers by water in U.S. foreign commerce was still evident in 1961. (See 107 CONG. REC. 18241 (1961), quoted at page 21, *infra.*) Unless the Congress were to undertake the somewhat drastic measure of regulating mergers among foreign companies, the regulation of mergers among United States-owned steamship companies would have been of little importance insofar as the problems of this nation's foreign commerce were concerned.

Under a separate heading, the Alexander Committee did consider the problems of consolidation of control of the strictly domestic waterborne commerce of the United States, which under the cabotage laws must be served by United States-owned companies (46 U.S.C. § 883). However, the Committee did not recommend that Congress enact legislation respecting consolidations among such carriers. Noting that railroad control of water carriers was twice as prevalent as water carrier consolidation, the Committee concluded that the Panama Canal Act of 1912 (37 Stat. 566, 49 U.S.C. § 5(14)-(16))<sup>15</sup> went "far toward eliminating some of the undesirable practices which were found by the Committee to exist in the domestic commerce of the United States." (*Id.* at 409, 422.)

It seems reasonable to conclude that Congress was satisfied that existing law was adequate to deal with the problems of steamship company mergers and that it would be imprudent to grant the Commission merger jurisdiction, with its attendant antitrust immunity. If Congress had intended to grant merger jurisdiction over United States-owned steamship companies only, and other kinds of jurisdiction over foreign steamship companies, some

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15. Section 11 of the Panama Canal Act made unlawful the control of any common carrier by water by railroads which the I.C.C. finds controls, reduces or prevents competition on any given route by water, and it also denied the use of the Panama Canal to any domestic or foreign trade water carrier found by any competent court to be operating in violation of the Sherman Act or acts supplementary thereto.

specific reference to the duality of regulation surely would have been included in the statute.<sup>16</sup>

## 2. The 1961 Amendments.

The legislative history of the 1961 amendments to Section 15 confirms the foregoing analysis and demonstrates that Congress then regarded Section 15 as extending only to continuing working arrangements. Inasmuch as the first paragraph of Section 15 was reenacted in 1961, the construction placed upon it by Congress at that time is entitled to great weight. *Federal Housing Authority v. Darlington*, 358 U.S. 84, 90 (1958); *Clark v. Uebersee Finanz Korp.*, 332 U.S. 480, 489 (1947).

Public Law 87-346 (75 Stat. 763-64) added, among others, two provisions which appear as the last sentence of paragraph two and paragraph three of the amended Section 15.<sup>17</sup> Both of these provisions deal with conference arrangements, requiring a right of independent action under inter-conference agreements, freedom of withdrawal from conferences, and policing and shipper grievance machinery. It is significant that the language introducing these new provisions, relating to conference arrangements, refers back to paragraph one in each instance by use of "such agreement."<sup>18</sup> This scheme in the amendatory language confirms that the Congress intended in 1961 to enact, as amended, a statute that deals

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16. According to the Commission, "the same considerations which led Congress to grant this Commission the power to exempt anticompetitive rate fixing and pooling agreements from the strictures of the antitrust laws, would apply to a grant of the same power over agreements among domestic carriers to merge" (R.D. 36, p. 8). As we hope is apparent from the discussion above, the answer to this assertion is clear. Regulation of pooling and rate fixing agreements of *all* carriers serving this nation's foreign commerce was significant, but the regulation of mergers among only the United States-owned carriers serving such commerce was not. Moreover, Congress specifically extended Section 15 jurisdiction to pooling and rate fixing agreements but did not expressly extend that jurisdiction to merger agreements.

17. See Appendix A.

18. "No such agreement shall be approved . . . . The Commission shall disapprove any such agreement . . . ."

with agreements and arrangements of a continuing nature, a scheme which does not include mergers or merger agreements, as such.

The House report transmitting H.R. 6775 summarized the first paragraph of Section 15 as follows:

"It requires the filing with Board of all agreements . . . affecting, fixing, or regulating transportation rates or fares; *regulating competition*, pooling or apportioning earnings or traffic; specifying ports or otherwise regulating number and character of sailings between ports; affecting the volume of freight or passenger traffic to be carried; or providing in any manner for exclusive or cooperative working arrangements." (H.R. REP. NO. 498, 87th Cong., 1st Sess. 9 (1961), emphasis ours.)

Thus, the term "regulating competition" was regarded as the equivalent of "controlling, regulating, preventing, or destroying competition."<sup>19</sup> Needless to say, a merger could hardly be regarded as an agreement regulating competition.

On the floor of the Senate there was considerable discussion of the purpose of Section 15, and the view was reiterated that Government control of the international shipping community's "working agreements" was the only practicable way to prevent destructive rate wars and shipping monopolies. Senator Engle, floor manager of the bill, stated the history of regulation under Section 15, in part, as follows:

"In 1906 the royal commission, designated by the King of England, made a study of conference arrangements for the

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19. Cf. *Volkswagenwerk A.G. v. FMC*, 36 U.S.L.W. 4197, 4201 at n. 23 (U.S. March 6, 1968) where the Supreme Court recently stated as to the first paragraph of Section 15:

"Section 15 requires filing of 'every agreement' in any of seven categories, and one of the seven comprises all agreements which 'regulat(e) . . . competition.'" (Omission the Court's).

See also *Congress and the Monopoly Problem—Fifty-Six Years of Anti-Trust Development, 1900-1956, History of Congressional Action in the Anti-Trust Field since 1900*, H.R. Doc. No. 240, 85th Cong., 1st Sess. 28 (1957) (Approval of "cooperative working arrangements" by the Maritime Commission exempts them from the antitrust laws).

purpose of determining whether or not the conference systems were detrimental to the commerce of the British Isles. . . . The commission came to the conclusion that . . . the alternative [to a conference system] was trade wars. . . . *The big companies would eat up the little ones, and in the end there would be bigger monopoly systems than ever.*

"The Alexander committee in the House of Representatives . . . came to identically the same conclusion; namely, that a conference system was essential to the life of the merchant marine and the stability of the merchant marine throughout the world." (107 CONG. REC. 18239 (1961), emphasis ours.)

Senator Schoeppel, who supported the bill, emphasized the problems of regulating the international shipping community:

"The problem we face today is the basic conflict between our traditional antitrust principles and the cartel concept which guides steamship conferences.

"In resolving this conflict, it is essential to bear in mind that the regulation of international shipping is difficult, if not impossible, for any single government to achieve. The foreign commerce of the United States is also the foreign commerce of another nation. At best we could control only one end of the journey, and even then only a minority of the carriers are U.S. citizens or U.S. firms. . . . [R]ate wars lead to monopoly or to the exposure of American shippers and lines to disastrous competition with foreign shippers and lines. Peace is possible only through the use of conference arrangements and agreements. . . .

"In the face of these facts, U.S. law for 45 years has exempted steamship conferences from the antitrust laws and substituted instead the restraint of Government regulation specifically designed to take into account the international character of the industry. This bill is based on that approach. . . ." (107 CONG. REC. 18241 (1961).)<sup>20</sup>

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20. Senator Schoeppel also noted that the State Department's analysis of the difficulties of controlling foreign carriers in foreign trade compelled the conclusion that competition among all U.S. foreign commerce carriers could only be effectively controlled by the regulation of conference arrangements and agreements.

The bill was enacted in the form advocated by its Senate proponents. This discussion on the Senate floor confirms and clarifies the Alexander Report recommendations. It shows the intent of Section 15 is to head off the concentration of power in the industry by regulating working arrangements among existing companies, rather than seeking to regulate mergers as such among them.

### 3. The Amendments to Section 7 of the Clayton Act.

Having failed to find any support for its position in the legislative history of Section 15, the Commission has strayed further afield. It finds in the 1950 amendments to Section 7 of the Clayton Act evidence that mergers approved by the Commission were to be immunized from the antitrust laws. The final paragraph of Section 7 of the Clayton Act, as amended in 1950 (15 U.S.C. § 18), provides that Section 7 shall not apply to transactions authorized by the Commission, among other agencies, "under any statutory provision vesting such power."

The Commission's decision sets forth a letter written in 1950 by the Vice Chairman of the United States Maritime Commission to the Senate Subcommittee then considering the proposed amendments to Section 7 of the Clayton Act (R.D. 36, p. 15). That letter expressly refers to Section 15 and the provisions of H.R. 2734, amending Section 7, but made no contention that Section 15 encompasses transactions within Section 7 of the Clayton Act.<sup>21</sup> Although Congress included the Commission in the provisions of the last paragraph of Section 7, the legislative history makes clear, as the Commission's decision acknowledges (R.D. 36, p. 16), that "in making this addition, however, it is not intended that the Maritime Commission, or, for that matter, any other agency included in this category, shall be granted any authority or powers which it does not already possess." (S. REP. NO. 1775, 81st Cong., 2d Sess. 7 (1950).)

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21. The Commission overstates the contents of this letter (R.D. 36, p. 16), which is set forth in full in the decision (R.D. 36, p. 15 at n. 10) and speaks for itself.

It seems obvious from this disclaimer that Congress did not in 1950 undertake to determine the extent of powers possessed by any of the regulatory agencies, but in the interests of accommodation, any agencies that could arguably assert a conflicting jurisdiction were listed in the exclusion. Congress had no obligation to determine what the precise jurisdiction of each of the agencies concerned might be.

On at least two occasions the Supreme Court has squarely rejected the contention that inclusion in the last paragraph of Section 7 of the Clayton Act was a confirmation of merger jurisdiction or authority to immunize mergers in the agencies there enumerated. In *Milk Producers Ass'n. v. United States*, 362 U.S. 458 (1960), the Supreme Court held that the Secretary of Agriculture's power to approve agricultural marketing agreements did not extend to mergers, and the listing of the Secretary of Agriculture in the last paragraph of Section 7 was not regarded by the Court as a congressional recognition of merger authority in the Secretary. In *California v. Federal Power Commission*, 369 U.S. 482 (1962), the Court held that the Commission lacked authority to immunize mergers from the antitrust laws and specifically rejected the contention that enumeration of the Federal Power Commission (FPC) in the last paragraph of Section 7 of the Clayton Act manifested a recognition by Congress of such merger immunizing jurisdiction, stating as follows:

"The words 'transactions duly consummated pursuant to authority' given the Commission 'under any statutory provision vesting such power' in it are plainly not a grant of power to adjudicate antitrust issues. Congress made clear that by this proviso in § 7 of the Clayton Act '. . . it is not intended that . . . any . . . agency' mentioned 'shall be granted any authority or powers which it does not already possess' " (369 U.S. at 486).

The FPC had been given express authority to approve or deny the right of a natural gas company to "acquire . . . facilities or extensions thereof" in Section 7 of the Natural Gas Act (15 U.S.C. § 717f(c)). Thus, wholly unlike the present case, the

FPC had express authority to approve the asset acquisition which was before it, denominated by the Court as a "merger" (e.g. 369 U.S. at 484). But the asset acquisition had been preceded by a stock acquisition, and a Government antitrust suit challenging the stock acquisition was pending. The Court said that if the Commission were permitted to treat "the entire relation of the companies—from the acquisition of the stock to the merger—as an integrated transaction . . . the Commission would be allowed to do by indirection what it has no jurisdiction to do directly" (369 U.S. at 490). Hence, the Court held that the FPC should defer to the pending antitrust proceeding, among other reasons, *because its approval nevertheless would not confer antitrust immunity.*

The Commission seeks to distinguish both cases: *Milk Producers* on the ground that the Secretary of Agriculture is not authorized to approve mergers but the Commission is;<sup>22</sup> and *California* on the ground that the FPC is not authorized to immunize mergers from the antitrust laws but the Commission is (R.D. 36, p. 17). We doubt that this Court will be impressed with that kind of boot strap argument. The point at issue is whether Section 15 confers merger authority on the Commission. It is clear from *Milk Producers* and *California* that Section 7 of the Clayton Act is not a recognition of such authority. Hence, the Commission's claim to merger jurisdiction is not advanced by reference to the 1950 amendment to Section 7.

#### 4. The AEIL Case and Advices to Congress.

The Commission also finds support in various communications between the Commission and Congress respecting the Commission's decision in the *AEIL* case.<sup>23</sup> In that case the Commission

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22. The attempt to stretch "agreements' jurisdiction to encompass a merger embodied in an agreement was specifically disapproved in the *Milk Producers* case, yet it serves as the Commission's premise for distinguishing *Milk Producers* from this case.

23. Agreement No. 8555 between Isbrandtsen Steamship Co., Inc., Isbrandtsen Co., Inc. and American Export Lines, Inc., 7 F.M.C. 125 (1962).

approved pursuant to Section 15 an agreement between competing companies for the sale of steamship assets that contained a covenant not to compete on the part of the seller. The covenant not to compete was clearly subject to Section 15, but it is far from clear whether the decision purported to approve the acquisition of assets. In any event, the decision does not contain any reasoned discussion of the problems presented by the Commission's exercise of merger jurisdiction, and the Commission's decision below in this case was therefore essentially a case of first impression.<sup>24</sup>

The Commission, however, treated the *AEIL* case as a favorable merger precedent, and referred to a report to the Celler Committee by former Commission Chairman Stakem to the effect that the *AEIL* case "constitutes notice that merger agreements must be filed with the Commission" (R.D. 36, p. 18). Unfortunately, the Commission misquoted Chairman Stakem's report. Furthermore, it is perfectly clear from Chairman Stakem's testimony before the Committee that he regarded the Commission's jurisdiction as extending only to merger agreements containing covenants not to compete.<sup>25</sup> Indeed, the Commission concedes as

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24. See Agreements No. 8745 and 8745-1, 7 F.M.C. 199, 200 (1962), where the *AEIL* case is cited as jurisdictional authority for approval of a covenant not to compete contained in a steamship sales agreement between two companies not shown to have previously been in competition.

In the briefs before the Commission both sides pointed to various other Commission decisions in arguably analagous cases as either supporting or not supporting Commission jurisdiction over mergers. None addressed itself to the questions here presented, and none in our opinion warrant consideration by this Court.

25. The pertinent part of the testimony is as follows:

"Mr. Appel: . . . My question reduces itself to this: Are shipping lines to be on notice that if they desire to merge, they must submit the proposal under Section 15 of the Act?

"Mr. Stakem: I think certainly if the plan calls for a noncompete or has noncompete clauses in it, that it falls within the sphere that this Commission should look at." (*Progress Report—Federal Maritime Commission*, Hearing before the Antitrust Subcommittee of the House Committee on the Judiciary, 87th Cong., 2d Sess. 22 (1962).)

Later, Chairman Stakem submitted the statement misquoted by the Commission, which can only be interpreted as considering an express covenant

much at an earlier point in its decision (R.D. 36, p. 13, n. 9).<sup>26</sup> Significantly, and in contrast with the Alexander Committee experience, the Celler Committee uncovered a trend toward ownership concentration among United States-owned foreign commerce carriers, and it believed the agency principally concerned was the Department of Justice.<sup>27</sup>

#### D. IMPLIED REPEAL OF THE ANTITRUST LAWS IS NOT FAVORED.

The principal consequence of granting Section 15 approval of a merger is to immunize that merger from the antitrust laws. The Commission recognizes that this would be the consequence, but is undaunted by the numerous decisions holding that the repeal of the antitrust laws by implication is not favored.

In a long line of decisions reaching back over at least the last twenty-five years, the Supreme Court has held, with ever-

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not to compete, or some other working arrangement, as essential to Section 15 jurisdiction over agreements pertaining to merger:

"I believe that Section 15 and our decision in the Isbrandtsen-Export Merger case constitute notice that *merger agreements* between common carriers subject to the Shipping Act, 1916, *which control, regulate, prevent, or destroy competition or in any way provide for exclusive, preferential, or cooperative working arrangements*, must be filed with the Commission. . . ." (Id. at 23, emphasis ours.)

26. We cannot understand by what reasoning the Commission can consistently conclude that Chairman Stakem's statement before the Celler Committee "shows only what a single member of the Commission may have felt in casting his vote" (R.D. 36, p. 13, n. 9), but Chairman's Stakem's statements, nevertheless, reflect the Commission's position that merger agreements are within its jurisdiction (R.D. 36, pp. 17-18), and a previous Vice Chairman's letter to a congressional committee in 1950 also represented the views of the entire Commission (R.D. 36, pp. 15-16). The only consistency is that the Commission's decision adopts what supports and rejects what detracts from its ultimate conclusion.

27. In its report, on the "Ocean Freight Industry" the Celler Committee, with the "Natomas group" and the AEIL combination specifically in mind, recommended "as a minimum program looking toward the reversal of this trend" of declining U.S. merchant shipping:

"(3) A study be undertaken by the Department of Justice in conjunction with the maritime agencies to determine whether control of U.S.-flag vessels and lines is becoming too highly concentrated for the best interests of the United States and, if so, what steps should be taken to correct the situation." (H.R. REP. NO. 1419, 87th Cong. 2d Sess. 46-48, 83 (1962).)

increasing regularity, that the repeal of the antitrust laws by a regulatory statute will be implied only if necessary to give effect to the regulatory scheme; and the Court has repeatedly construed regulatory statutes narrowly in order to give full effect to the antitrust laws.<sup>28</sup> This has been particularly true in instances where regulatory agencies have asserted jurisdiction respecting mergers.

In *Milk Producers Association v. United States*, 362 U.S. 458 (1960), the Court held that authority granted to the Secretary of Agriculture by Section 8b of the Agricultural Adjustment Act (7 U.S.C. § 608b) to approve agricultural marketing agreements and to exempt them from the antitrust laws did not extend to an agreement to acquire the total assets of a retail outlet.

In *California v. Federal Power Commission*, 369 U.S. 482 (1962), the Court narrowly construed Section 7 of the Natural Gas Act to preserve the antitrust jurisdiction of the federal district courts over mergers of natural gas pipeline companies (pp. 23-24, *supra*). Referring to its decision in the *Milk Producers* case, the Court observed that "immunity from the antitrust laws is not lightly implied" (369 U.S. at 485).

In *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963), the Court held that approval of a merger by the Comptroller of Currency pursuant to the Bank Merger Act (12 U.S.C. § 1828) did not clothe the merger with immunity from Section 7 of the Clayton Act. This conclusion was reached in spite of considerable legislative history which tended to establish that Congress at the time of enactment of the Bank Merger Act had thought Section 7 to be inapplicable to bank mergers, and had

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28. *United States v. Third National Bank in Nashville*, 36 U.S.L.W. 4178 (U.S. March 4, 1968); *Denver & Rio Grande Western R. Co. v. United States*, 387 U.S. 485 (1967); *United States v. First City National Bank*, 386 U.S. 371, (1967); *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213, 217-18 (1966); *United States v. Philadelphia National Bank*, 374 U.S. 321, 350-52 (1963); *Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963); *California v. Federal Power Commission*, 369 U.S. 482, 485 (1962); *Milk Producers Ass'n. v. United States*, 362 U.S. 458, 469-70 (1960); *United States v. RCA*, 358 U.S. 334, 346-52 (1959); *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 456-57 (1945); *United States v. Borden*, 308 U.S. 188, 198-201 (1939).

therefore authorized the Comptroller of Currency to consider competitive factors before approving mergers. The Court reiterated its strong disinclination to imply repeal of the antitrust laws:

“Repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions.” (374 U.S. at 350-51.)

In the recent case of *Denver & Rio Grande Western R. Co. v. United States*, 387 U.S. 485 (1967), the Court held a new stock issue that is the “first step” in a control acquisition must be appraised by the ICC under the strict test of Section 7 of the Clayton Act, even though a control acquisition would be entitled to immunity from Section 7 under the less rigid test of Section 5 (2) of the Interstate Commerce Act.

In *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213 (1966), the Court held that the Commission’s jurisdiction to approve Section 15 agreements and immunize them from the antitrust laws did not displace the antitrust laws respecting unfilled Section 15 agreements. The decision emphatically rejected the argument, seemingly supported by earlier decisions of the Court,<sup>29</sup> that Section 15 effected a *pro tanto* repeal of the antitrust laws respecting all matters within its purview. On the contrary, the Court held that Section 15 is to be strictly construed.

“We have long recognized that the antitrust laws represent a fundamental national economic policy and have therefore concluded that we cannot lightly assume that the enactment of a special regulatory scheme for particular aspects of an industry was intended to render the more general provisions of the antitrust laws wholly inapplicable to that industry. We have, therefore, declined to construe special industry regulations as an implied repeal of the antitrust laws. . . .

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29. *United States Navigation Co. v. Cunard Steamship Co.*, 284 U.S. 474 (1932); *Far East Conference v. United States*, 342 U.S. 570 (1952). The thrust of those decisions as previously understood was in our opinion correctly reflected by the decision of this Court in *Carnation* (336 F.2d 650), which was reversed by the Supreme Court.

"The historical background of the Shipping Act does not indicate that a different rule of construction should be applied in interpreting that Act. The Congress which enacted the Shipping Act was not hostile to antitrust regulation. On the contrary, the Shipping Act was the end product of an extensive investigation of the shipping industry that was conducted by the Congress which enacted the Clayton Act.

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"[I]t seems likely that the [Alexander] Committee really only wanted to give the shipping industry a limited antitrust exemption. We do not believe that its purpose would be frustrated by the application of the antitrust laws to the implementation of [unfiled] conference agreements. . . .

"But even if the Committee considered the possibility of a complete antitrust exemption . . . those who drafted the Shipping Act during the next Congress decided not to give the industry complete antitrust immunity." (383 U.S. at 218-20.)

We are aware of no case in which the language of a regulatory statute has been broadly construed to give antitrust immunity in areas not expressly covered by an antitrust exemption. Only where the alleged antitrust violation has comprised the "precise ingredients" of a matter respecting which the agency has express jurisdiction to grant antitrust immunity has a repugnancy between the antitrust laws and the regulatory statute, and subordination of the former, been found. *Pan American World Airways v. Civil Aeronautics Board*, 371 U.S. 296, 305 (1963).<sup>30</sup>

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30. The Court's recent decision in *Volkswagenwerk A.G. v. Federal Maritime Commission*, 36 U.S.L.W. 4197 (U.S. March 6, 1968), is also such a case. *Volkswagen* involved investigation of an agreement among common carriers and other persons subject to the Act to assess cargo with an additional charge represented by an aliquot portion of payments to be made by the carriers into a mechanization fund established pursuant to a collective bargaining agreement between an association of carriers and a labor union. The Commission, perhaps motivated in part by the labor negotiation overtones, held the agreement did not affect competition and was therefore not subject to its Section 15 jurisdiction. The Court reversed, holding that the agreement was quite clearly a "cooperative working arrangement" within the meaning of Section 15. The Court said the

**E. OTHER REGULATORY AGENCIES WITH POWER TO AUTHORIZE MERGERS AND IMPART ANTITRUST IMMUNITY HAVE BEEN GRANTED EXPRESS MERGER AUTHORITY WITH SPECIFIC STATUTORY STANDARDS AS WELL AS POWER TO DISSOLVE MERGERS.**

In the instances where Congress has wished a regulatory agency to exercise jurisdiction over mergers and to provide antitrust immunity, it has done so in clear and specific language. The Interstate Commerce Commission (ICC), the Civil Aeronautics Board (CAB) and the Federal Communications Commission (FCC) are each authorized in clear and unambiguous language to approve the acquisition of one regulated carrier by another, by statutory merger, stock acquisition, consolidation or otherwise. In addition, the CAB and the ICC are each given authority respecting cooperative working arrangements of various kinds between carriers in separate sections of their governing statutes. Comparison of these regulatory schemes with that provided by Section 15 gives rise to the strong inference that Congress would have specifically granted merger jurisdiction had it intended for this Commission to exercise it.

**1. Specific Grants of Merger Authority.**

The first of these explicit statutes conferring power to adjudicate and validate mergers was passed in 1920 as a reaction to two Supreme Court decisions which had applied the Sherman Act to railroad mergers.<sup>31</sup> Accordingly, the Transportation Act of 1920 (41 Stat. 481) revised old Section 5 of the Interstate Commerce Act (ICA). New Section 5 (1) of the ICA specifically legalized contracts, agreements or combinations among carriers for the pooling or division of traffic or earnings when approved by the ICC. New Sections 5(2) and 5(6) expressly conferred

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Commission, in limiting Section 15 to cooperative working agreements that "affect competition" and in holding that the assessment agreement did not "affect competition", used that phrase in a "highly artificial sense" and took "an extremely narrow view" of Section 15 (36 U.S.L.W. at 4200). Thus, there, as in this case, the Commission had placed too much emphasis on the "controlling, regulating, preventing or destroying competition" clause without due regard to the overall structure of the statute.

31. *Northern Securities Co. v. United States*, 193 U.S. 197 (1904); *United States v. Union Pacific R. Co.*, 226 U.S. 61 (1912). See also *United States v. Southern Pacific Co.*, 259 U.S. 214 (1922) (applying pre-1920 law).

authority on the Commission to approve acquisition of "control" of one carrier over another or "consolidation" of two or more carriers under common ownership (41 Stat. 481-82). Section 5(8) of the 1920 Act then exempted any carrier "affected by an order under this section [5] and any corporation organized to effect a consolidation approved and authorized in such order" from the antitrust laws "insofar as may be necessary to enable them to do anything authorized or required by any [such] order. . . ." (41 Stat. 482.)<sup>32</sup>

Section 412 of the Federal Aviation Act (FAA) (formerly the Civil Aeronautics Act — CAA) (49 U.S.C. § 1382) authorizes the CAB to approve and exempt from the antitrust laws under Section 414 (49 U.S.C. § 1384) cooperative working agreements of various kinds.<sup>33</sup> The section, originally enacted in 1938, is virtually identical to and was patterned after Section 15 of the Shipping Act. *McManus v. CAB*, 286 F.2d 414 (2d Cir. 1961); *Mediterranean Pools Investigation*, 9 F.M.C. 264, 290 at n. 13 (1966). Both sections are obviously limited to working arrangements.

In addition to jurisdiction over cooperative working arrangements, Congress wished the CAB to exercise jurisdiction over

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32. In 1933 Congress further amended Section 5 of the Interstate Commerce Act to consolidate the provisions of old Sections 5(2) and 5(6) under a new Section 5(4) with common standards for approval and to provide additional authorization for ICC approval of non-carrier control of two or more carriers by stock ownership. Old Section 5(8) was continued as Section 5(15). (48 Stat. 217.) Then in 1940, Sections 5(1), 5(2) and 5(11) were enacted substantially in their present form (54 Stat. 904).

33. Section 412 of the Federal Aviation Act (49 U.S.C. § 1382) provides, in part, as follows:

"Every carrier shall file . . . every contract or agreement . . . affecting air transportation . . . for pooling or apportioning earnings, losses, traffic, service, or equipment, or relating to the establishment of transportation rates, fares, charges, or classifications, or for preserving and improving safety, economy, and efficiency of operation, or for controlling, regulating, preventing, or otherwise eliminating destructive, oppressive, or wasteful competition, or for regulating stops, schedules, and character of service, or for other cooperative working arrangements." (Emphasis ours.)

mergers of airlines. Consequently, also in 1938 it adopted Section 408 of the CAA (now the FAA) (49 U.S.C. § 1378) specifically and in detail conferring jurisdiction to approve mergers, which were also exempted under Section 414 from the antitrust laws. If Section 412 had been thought by Congress to confer jurisdiction over mergers, it would have been needless for Congress to have enacted Section 408 specifically conferring such jurisdiction.

As in the case of the merger approval provisions of the ICA and the FAA, Congress *specifically* vested jurisdiction in the FCC to approve consolidations and acquisitions among telephone companies for the effectuation of control by one such company over another.<sup>34</sup> It also granted the FCC specific authority to approve consolidations or mergers among *domestic* telegraph carriers.<sup>35</sup> In both provisions the approved transactions are automatically exempted from the antitrust laws.

The Commission found a chronological analysis of statutory development to be a persuasive explanation for the lack of specific merger authority in Section 15, and the presence of specific merger authority in the other regulatory statutes discussed above (R. D. 36, pp. 9-10). The Commission asserts that the differences in statutory language would be significant only if Section 15 had been adopted by Congress subsequent to the adoption of the other analogous regulatory provisions; however, since Section 15 was adopted *prior* to the other provisions, no significance is to be attached to the differences in language. The subsequent specificity in other statutes is chalked up by the Commission as a "later stylistic preference in legislative draftsmanship" (R. D. 36, p. 10).

This analysis must be based on the premise that the successive Congresses became more sophisticated in the use of language and

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34. Federal Communications Act of 1934, 48 Stat. 1080 (47 U.S.C. § 221).

35. Act of March 6, 1943, 57 Stat. 5 (47 U.S.C. § 222). This enactment's specific reference to "domestic" carriers underscores the point made previously that Congress would not have granted a limited merger jurisdiction to the Maritime Commission over United States-owned steamship companies only without specifically so stating.

that a good deal was learned about the art of draftsmanship in the four years that elapsed between enactment of the Shipping Act and enactment of the specific railroad merger provisions of the ICA.<sup>36</sup> Otherwise, it might equally be said that had Section 15 been adopted subsequent to the other provisions, it was merely a stylistic preference *for that Congress not to spell out merger jurisdiction specifically*.

Whatever might otherwise be said for this kind of chronological analysis, it breaks down entirely, it seems to us, in the light of the fact that Congress in 1914 adopted the Clayton Act, in which it specifically dealt with corporate consolidations of the kind then thought most prevalent by Congress, to wit, through stock acquisitions tending substantially to lessen competition. Thus, the language for dealing with corporate control through consolidation of ownership was available had Congress chosen to use it. While Section 7 was later held by the courts not to apply to asset acquisitions and statutory mergers, this hardly supports the position of the Commission. If the courts were unwilling to read the language of Section 7 as encompassing any form of corporate consolidations other than those specifically provided for, they could hardly be expected to read the general language of Section 15 as incorporating corporate consolidations and mergers.

Another weakness in the Commission's chronological analysis arises from the fact, already noted, that Congress very substantially amended Section 15 in 1961, at which time the first paragraph was re-enacted. It can hardly be said that the 1961 Congress was unfamiliar with the "stylistic preference in legislative draftsmanship" manifested by the earlier Congress of conferring merger jurisdiction on regulatory agencies in specific terms. In the light of that background, it would be anomalous, it seems to us, for a court to hold that while Section 412 of the FAA

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36. The Commission stresses that Section 5b of the ICA, "the section which is now comparable to Section 15," was not enacted until 1948, but ignores the fact that the Transportation Act of 1920 extended ICC jurisdiction to pooling agreements of various kinds and specifically to railroad mergers (see discussion at pp. 30-31, *supra*).

applies only to cooperative working arrangements, Section 15, upon which Section 412 was patterned and which was re-enacted subsequent to Section 412, extends to agreements for all forms of corporate consolidation as well.<sup>37</sup>

## 2. Specific Grants of Merger Standards.

Another reason for not construing Section 15 as encompassing mergers is the complete absence therefrom of specific standards for approval of mergers. The "public interest" standard, which was not added until 1961, provides the most obvious general test. In contrast, Section 15 contains rather detailed standards respecting continuing agreements among carriers. The inadequacy of the language of Section 15 for dealing with mergers becomes evident when compared with the requirements and standards of other regulatory statutes which do contemplate the exercise of merger jurisdiction by those agencies.

Section 5(2) of the ICA enumerates in some detail the kind of corporate combinations which may be approved, and the procedural steps for obtaining approval are also spelled out in some detail. The factors that the ICC is specifically directed to consider in determining whether to approve a merger include (a) the effect of the proposed transaction on adequate transportation service, (b) the effect on the public interest of including or not including other carriers in the merger, (c) the nature of the total dividends or fixed charges resulting from the proposed transaction, (d) the interest of the carrier employees affected

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37. And see *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 456 (1945), where the Court held that section 5(1) of the ICA could not be read to include authorization for the ICC to approve and exempt from the antitrust laws agreements among carriers regulating rates. It was necessary for Congress to enact *specific* legislation authorizing ICC jurisdiction over such agreements in 1948 (62 Stat. 472, 49 U.S.C. § 5b). However, even Section 5b has been strictly construed against ICC jurisdiction. *Riss & Co. v. Association of American Railroads*, 170 F. Supp. 354 (D. D.C. 1959) *certiorari denied sub nom Atlantic Coast Line R. Co. v. Riss & Co.*, 361 U.S. 804 (1959).

The Congress that enacted Section 5b also noted that it was patterned after "the provisions of Section 15 of the Shipping Act, 1916... with respect to contracts between common carriers by water subject to that Act," H.R. REP. No. 1100, 80th Cong., 2d Sess. (1948), 2 U.S. Code Cong. Service, 1844, 1848 (1948).

(49 U.S.C. § 5 (2) (c)-(f)),<sup>38</sup> and the rather extensive “public interest” criteria set forth in the National Transportation Policy of the ICA (49 U.S.C. preceding § 1).

Similarly, the FCC (47 U.S.C. § 222) and the CAB (49 U.S.C. § 1378) are both guided by specific statutory standards addressed to the question of determining whether to grant approval to mergers.<sup>39</sup> Both the ICC and the CAB have separate standards for guidance in approving cooperative working arrangements of the type contemplated in Section 15.<sup>40</sup>

The complete inadequacy of guidelines addressed to consideration of the approval or disapproval of mergers under Section 15 is exemplified by the Commission’s decision on the merits in this very case and the dissenting opinions of Commissioners Hearn and Day. According to Commissioner Day, “the majority is guessing at guidelines” (R.D. 36, p. 29), and Commissioner Hearn includes in his two opinions a considerable enumeration of matters that were not considered by the Commission, including the effect of the merger upon Government investment through subsidy payments made to the merging lines, the effect of the merger upon the shipping public and the merger applicants’ employees, the effect of the merger upon the future fleet development and operations of the three companies, as well as many others (R.D. 36, pp. 26-27; R.D. 43, pp. 52-54). The Commission did not even have before it the corporate form that the merger is to take, for these matters had not yet been determined by the merger applicants. The inadequacies of the

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38. Although these specific criteria were not added until 1940, prior to that time the ICC was charged with the duty of formulating a master plan to *compel* mergers among railroads. See Penn-Central Merger Cases, 389 U.S. 486, 492-93 (1968). This is clearly not the assignment given to the Commission in 1916 or 1961.

39. In response to President Kennedy’s message to Congress (1962 U.S. Code Cong. Admin. News 4148, 4153-54), an inter-agency committee was established to prescribe additional criteria that the CAB and ICC might utilize in merger cases, and a release specifying these additional criteria was later issued (109 CONG. REC. 3671-73 (1963)).

40. 49 U.S.C. §§ 5(1), 5b; 49 U.S.C. § 1382.

Commission's decision in this regard are discussed in greater detail at pp. 68-73, *infra*.

### 3. Specific Authority to Order Divestiture.

Finally, it is important to note that the ICC, CAB, and FCC are each specifically authorized under Section 11 of the Clayton Act to institute a proceeding for enforcement of Section 7 of the Clayton Act and to issue orders, among other things, requiring respondent in such proceedings to "divest itself of the stock, or other share capital, or assets, . . . in the manner and within the time fixed by said order" (15 U.S.C. § 21). Thus, if any of these three agencies should decide to approve a merger after full and proper hearing, it has a statutory basis upon which subsequently to order divestiture if post-transaction scrutiny warrants such action. The Commission's decision minimized its own lack of any such power, asserting that as a result of the Commission's "pre-transaction scrutiny . . . the need for orders of divestiture is substantially lessened if not eliminated" (R.D. 36, p. 12). Of course, the same could also be said respecting the pre-transaction scrutiny by each of the other three agencies, which, as we discuss below,<sup>41</sup> is much more complete than the scrutiny the Commission indicates it will give to mergers.

The Supreme Court has already indicated the importance it attaches to the grant of jurisdiction contained in Section 11 of the Clayton Act. Thus, in *California v. Federal Power Commission*, *supra*, in holding that the Federal Power Commission lacked authority under Section 7 of the Natural Gas Act to immunize mergers from the antitrust laws, the Court emphasized that the Federal Power Commission was not enumerated in Section 11 of the Clayton Act as one of those agencies authorized to enforce compliance with Section 7 of the Clayton Act.

We think the inference to be drawn from the express congressional grant to each of the three sister agencies (CAB, ICC, FCC) to approve mergers under specific statutory guidelines and immunize them from the antitrust laws, as well as to enforce Section 7 of the Clayton Act, when coupled with the absence of

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41. pp. 60, 63-64, 70-74, *infra*.

such express grants to the Commission, cannot be cast aside as a stylistic preference of Congress. We are confident the Supreme Court would not so regard it, for the Commission's authority is deficient in two of the areas which prompted the Court to conclude that the Federal Power Commission lacked authority to immunize mergers in *California v. Federal Power Commission, supra*: (a) No specific authority to exempt mergers from the antitrust laws, and (b) no power under Section 11 of the Clayton Act to enforce Section 7 of the Clayton Act.

**F. EXERCISE OF THE COMMISSION'S ATTENUATED VERSION OF MERGER JURISDICTION WOULD BE CONTRARY TO SOUND PUBLIC ADMINISTRATION AND THE PUBLIC INTEREST.**

It cannot be emphasized too strongly that the Commission's view of its own jurisdiction over mergers is rent with enormous gaps. As we have already noted, the Commission construes its merger jurisdiction as extending only to mergers among United States-owned common carriers and other persons subject to the Act accomplished by agreement. We submit that exercise of such an attenuated merger jurisdiction would be patently contrary to the public interest.

It seems apparent that the exercise of jurisdiction over only limited types of mergers would leave the regulated companies free either to invoke the Commission's jurisdiction or not to do so in accordance with their own ends. If it seemed desirable to obtain antitrust immunity for a particular transaction, the parties could enter into an agreement and submit it to the Commission for its approval. If the transaction did not seem of sufficient consequence to run afoul of the antitrust laws, the parties could avoid the Commission's jurisdiction by omitting the agreement. It is difficult to see how the Commission could exercise a meaningful regulatory supervision over mergers if its jurisdiction were so easily avoided.

Indeed, the pattern of ownership represented by the applicants in this very case illustrates the point. Natomas Company, a company not subject to the jurisdiction of the Commission, has

acquired control of both APL and PFEL through purchase of the stock of both lines. APL in turn owns approximately 93% of the stock in AML (R. Ex. 2; Tr. 47-51). These interests were all acquired without any regulatory supervision from the Commission under Section 15 (R. Tr. 59-60). Further, the statutory merger of AML and APL could be brought about under Delaware law without any agreement between the two companies (R.D. 43, p. 42).

Not only does this gap in regulatory jurisdiction give the combining companies an option respecting invocation of the Commission's jurisdiction,<sup>42</sup> but it apparently creates blind spots in the Commission's exercise of its jurisdiction when it is invoked. Thus, in this case, instead of regarding the prior acquisitions accomplished beyond its jurisdiction as matters to be viewed with grave concern, the Commission regarded them as diminishing the competitive consequences of the instant merger.<sup>43</sup> One can perhaps sympathize with the Commission for taking this approach, inasmuch as it is without power to do anything about the prior concentration accomplished beyond its regulatory guise. At the same time, the Commission has purported to immunize the entire corporate consolidation of these three companies from the antitrust laws. We submit that a scheme of regulation that could produce such a result can hardly be held up as a model of public administration. If Congress had created such a regulatory monstrosity by clear and unambiguous terms, that would be one thing. For the Commission to pattern it out of whole cloth is quite another.

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42. See note 5, *supra*.

43. The Commission's observation in this regard was as follows (R.D. 43, p. 39):

"No substantial increase in economic concentration will result from the merger of APL and its 93%-owned subsidiary, AML. The concentration resulting from the merger of PFEL is somewhat diluted by the affiliation, through common ownership of stock, which has existed for more than ten years."

Compare Monarch-Challenger Merger Case, 11 C.A.B. 33, 34-35 (1949). (Stock acquisitions sufficient for merger and a subsequent merger must both be judged by the same standards under Section 408(b) of the FAA.)

Congress has been reasonably careful in extending its own grants of merger jurisdiction to regulatory agencies to see that such regulatory gaps do not exist. Thus, Section 5(2) of the ICA extends to the merger or consolidation by two or more carriers as well as to the acquisition of control of such carriers "through ownership of their stock or otherwise . . ." Section 408 of the FAA applies to "consolidation, merger, purchase, lease, operating contract or acquisition of control. . . ." Similarly, the jurisdiction granted to the FCC over mergers of domestic telephone and telegraph companies is all-pervasive in scope.<sup>44</sup> Further, there can be no doubt that Section 7 of the Clayton Act as now written extends to all forms of corporate acquisitions and consolidations, whether by stock or asset acquisition or otherwise.

The Commission recognizes its obligation to maintain regulatory impartiality as between United States flag and foreign flag companies (R. D. 36, pp. 8-9). Indeed, it was the asserted desirability of maintaining the Government's regulatory functions separate and apart from its promotional functions in the maritime field that prompted President Kennedy to recommend and the Congress to enact legislation establishing the Federal Maritime Commission separate from the Maritime Administration.<sup>45</sup> Yet, if the Commission is to exercise regulatory jurisdiction respecting the mergers of United States-owned steamship companies, it will inevitably view such mergers permissively lest its disapproval place the United States-owned companies at a disadvantage vis-a-vis their foreign flag competitors over whose mergers the

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44. The Federal Communications Act, as amended, (47 USC § 222 (a)) provides in pertinent part as follows:

"The term 'consolidation or merger' includes the legal consolidation or merger of two or more corporations, and the acquisition by a corporation through purchase, lease or in any other manner, of the whole or any part of the property, securities, facilities, services, or business of any other corporation or corporations, or of the control thereof, in exchange for its own securities, or otherwise."

45. Reorganization plan No. 7 1961, 75 Stat. 841-843; Message from President John F. Kennedy to Congress, dated June 12, 1961, 107 CONG. REC. 9366, H.R. DOC. NO. 187, 87th Cong., 1st Sess. (1961).

Commission exercises no jurisdiction. This particular syndrome is also manifested in the Commission's opinion on the merits. The Commission indicated that it regarded the recent merger of certain Japanese steamship companies, over which the Commission exercised no jurisdiction, as a factor favoring its grant of approval for the instant merger, stating as follows:

"United States-owned carriers in foreign commerce are part of the American economy but foreign-owned carriers are not. No application of our antitrust laws based upon our desire to avoid concentration in our economy could rationally be directed against foreign carriers; they are free to pursue the efficiencies of concentration without regard to that, as witness the recent mergers of Japanese carriers under Japanese government pressure if not compulsion. This must be considered in weighing the merger of U.S. flag carriers, which definitely are a part of the American economy and a substantial factor in our balance-of-payments position, since our carriers must compete directly with foreign carriers." (R.D. 43, pp. 39-40, footnotes omitted.)

We submit that the exercise of Commission jurisdiction over mergers and the application of the inevitable regulatory philosophy manifested in the above quotation could lead to the virtual elimination through merger of competition within the United States-owned steamship industry. Such a result would be inconsistent with the nation's antitrust policy, as well as the policy which underlay the adoption of Section 15 in the first instance.

## **II. If the Commission Has Merger Jurisdiction, Its Findings, Analysis and Determination of the Legal Issues Are Inadequate to Support Approval.**

In this portion of the brief we assume for purposes of argument that the Commission does have jurisdiction pursuant to Section 15 to approve merger agreements and immunize them from the antitrust laws. We then ask: Must the Commission require a full disclosure of all merger plans, assess the ramifications and effects of the merger in all its aspects, including any

anticompetitive effects, and approve the merger only after finding that it is justified to meet an urgent transportation need or produce an important public benefit?

If this question correctly frames the Commission's duties, we submit that the Commission's decision is inadequate as a matter of law and cannot stand. Whether, on the basis of a supplemented record, findings and conclusions could be made to support the proposed merger is outside the scope of this brief.<sup>46</sup>

This case involves a proposed, horizontal merger of competing carriers, and is anticompetitive on its face. The Commission's decision has found no transportation need or public benefit to be served by the merger and has not required the applicants to come forth with sufficient evidence to provide a proper basis for assessing the consequences of the merger. Indeed, the applicants' merger plans were insufficiently developed at the time of the hearing for them even to inform the Commission respecting such matters as the corporate form of the merger transaction and the effect of the merger on the applicants' financial relations with the Government under their operating differential subsidy contracts, on their fleet operations and development, or on a broad range of other matters bearing on the public interest.

The Commission's first decision and order recognized this deficiency, remanding the matter to the Examiner for additional evidence. In their petition for reconsideration, the merger applicants protested their inability to inform the Commission respecting many of these matters of fundamental importance "for months to come" and lamented that the order of remand was "probably . . . the practical equivalent of a decision disapproving the merger agreement" (R.D. 38, pp. 1, 5). The Commission then entered its second decision and order approving the merger with one of the three majority Commissioners concurring on the ground that

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46. The Commission's decision erroneously asserts that "no exceptions were taken to the findings of fact upon which the Examiner based his conclusion to approve Agreement 9551" (R.D. 43, p. 2). Matson filed extensive exceptions to the findings of fact and conclusions reached in the initial decision (R.D. 29, pp. 1-4).

“the first Commission decision . . . would needlessly prolong the litigation” (R.D. 43, p. 45).

As we now demonstrate, the Commission has departed from its own standards for approvability of agreements under Section 15. Rather than applying a more rigorous standard to merger agreements, characterized by the Commission as “perhaps the most anticompetitive of them all” (R.D. 36, p. 6), the Commission has applied a more permissive standard than it applies to other agreements.

**A. THE BURDEN WAS ON THE APPLICANTS TO PROVE AND THE COMMISSION AFFIRMATIVELY TO FIND THAT THE MERGER AGREEMENT WAS JUSTIFIED BY AN URGENT TRANSPORTATION NEED OR CONFERRAL OF AN IMPORTANT PUBLIC BENEFIT.**

Section 15 provides that every agreement within its contemplation “shall” be filed with the Commission and that the Commission “shall . . . after notice and hearing, disapprove . . . any agreement . . . that it finds to be . . . unfair as between carriers . . . to operate to the detriment of the commerce of the United States . . . or to be contrary to the public interest. . . .” The section further provides that it is unlawful to carry out any agreement “before approval or after disapproval”.

Matson contends that this language places the burden on the merger applicants to establish by a preponderance of the evidence that the merger is consistent with each of the statutory standards and, perhaps of greatest importance, is not contrary to the public interest. Further, the Commission may not approve a merger agreement unless the applicants establish and the Commission finds that the degree of foreclosure of competition that will be brought about thereby is justified to meet an urgent transportation need or to confer an important public benefit. This construction is consistent with Section 7(d) of the Administrative Procedure Act, which provides that the “proponent of a rule or order shall have the burden of proof” (5 U.S.C. § 556). It is also consistent with the Commission’s own rule for the approvability of other types of anticompetitive agreements as specifically confirmed by the Supreme Court.

The test applied by the Commission under the public interest standard of Section 15 in appraising Section 15 agreements of all

kinds was elaborated by the Commission in its decision in *Mediterranean Pools Investigation*, 9 F.M.C. 264 (1966). The agreements there under consideration provided for the pooling of net freight revenues among member carriers of specific conferences. The Examiner's decision recommended approval of the agreements on the ground that there was not "an iota" of evidence controverting approval of the agreements and hence no finding could be made that the agreements were contrary to the public interest or the other tests specified in Section 15 (9 F.M.C. at 287). Although the Commission ultimately approved the agreements, it rejected the Examiner's test and emphasized the need for affirmative proof and findings that anticompetitive agreements were justified in the public interest.

After describing the historical context in which Congress had granted the Commission power to immunize anticompetitive agreements from the antitrust laws, the Commission emphasized the well-settled principle that the "'public interest' within the meaning of Section 15 includes the national policy embodied in the antitrust laws."<sup>47</sup> Hence, any anticompetitive agreement is presumptively contrary to the public interest until an appropriate justification is established by the applicant (9 F.M.C. at 290):

"[P]resumptively all anticompetitive combinations run counter to the public interest in free and open competition and it is incumbent upon those who seek exemption of anticompetitive combinations under section 15 to demonstrate that the combination seeks to eliminate or remedy conditions which preclude or hinder the achievement of the regulatory purposes of the Shipping Act."

Focusing upon the considerations which would justify the anticompetitive arrangement, the Commission in *Mediterranean Pools* declared that the burden of justification is met by showing that the proposed agreements "are *necessary* to produce important

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47. 9 F.M.C. at 289. The Commission cited *Isbrandtsen Co. Inc. v. United States*, 211 F.2d 51 (D.C. Cir. 1954), *certiorari denied sub nom. Japanese Atlantic & Gulf Conference v. United States*, 347 U.S. 990 (1954). *Accord* *Federal Maritime Commission v. Aktiebolaget Svenska Amerika Linien*, 36 U.S.L.W. 4213 (U.S. March 6, 1968).

public benefits and are based on *a serious transportation need*" (9 F.M.C. at 292, emphasis ours). In that particular case these criteria were met by showing that the competition eliminated by the agreements is "destructive and wasteful and in itself tends to work hardship on shippers", that the agreements were aimed at "eliminating malpractices" in the trade, and that the agreements would "restore rate stability" to the trade. These factors were considered responsive to the "regulatory purposes of the Shipping Act" (9 F.M.C. at 292).

The Commission's explanation in *Mediterranean Pools* of the public interest standard under Section 15 was in full accord with nearly all other recent precedents under Section 15.<sup>48</sup> The only aberrations were two decisions of the Court of Appeals for the District of Columbia Circuit entered in the course of the so-called *Travel Agents Case*, and these two decisions have this Term been rejected by the Supreme Court, *Federal Maritime Commission v. Aktiebolaget Svenska Amerika Linien*, 36 U.S.L.W. 4213 (U.S. March 6, 1968). Inasmuch as the Supreme Court's decision in the *Travel Agents Case* was handed down subsequent to the Commission's decision below in this case, it is obviously of great importance here.

The *Travel Agents Case* commenced in 1959 with an investigation of certain practices of respondent steamship conferences regarding travel agents. The Commission's first decision<sup>49</sup> held

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48. See, e.g., *Isbrandtsen Co., Inc. v. United States*, *supra*, note 47 at 57 (the Commission has the "duty to protect the public interest . . . to make sure that the conduct thus legalized does not invade the prohibitions of the antitrust laws any more than is necessary to serve the purposes of the regulatory statute"); *Greater Baton Rouge Port Commission v. United States*, 287 F.2d 86, 94-95 (5th Cir. 1961) ("Efficiency is not enough. It is not a cure-all. . . . National policy favors free and healthy competition; monopoly is the exception"); *California Stevedore & Ballast Co. v. Stockton Port District*, 7 F.M.C. 75, 82 (1962) ("our national policy makes free competition the rule, and monopoly the exception which must be justified. . . ."); *Transshipment and Apportionment Agreements—Indonesia & U.S. Ports*, 10 F.M.C. 183, 196 (1966) ("we will not permit any greater invasion of the antitrust laws than is necessary to serve the public interest . . .").

49. *Investigation of Passenger Steamship Conference Regarding Travel Agents*, 7 F.M.C. 737 (1964).

that a conference “tying rule”, which prohibited travel agents’ booking passage on conference ships from doing so for competing non-conference ships, and a conference “unanimity rule”, which required a unanimous vote of all conference members to authorize an increase in travel agents’ commissions, should be eliminated from the conference agreement, which itself had been previously approved by the Commission. The court of appeals set aside the order and remanded the case to the Commission for more detailed findings.<sup>50</sup> The court stated that it did not “read the statute as authorizing disapproval of an agreement on the ground that it runs counter to antitrust principles, the theory on which seemingly the Commission’s disapproval rests here” (351 F.2d at 761).

The Commission issued a further opinion on remand, in which it again disapproved the two rules on the ground that no adequate justification had been shown for their fundamental anti-competitive nature:<sup>51</sup>

“The parties seeking exemption from the antitrust laws for their agreement must demonstrate that the agreement is required by a serious transportation need, or in order to secure important public benefits. Otherwise, . . . it is our view that the public interest in the preservation of competition where possible, even in regulated industries, is unduly offended and the agreement is contrary to that interest within the meaning of Section 15.”

The court of appeals reversed the Commission’s order on the ground that it was not supported by substantial evidence.<sup>52</sup> The Supreme Court reversed the court of appeals and expressly approved the Commission’s statement of the “public interest” standard under Section 15:

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50. *Aktiebolaget Svenska Amerika Linien v. Federal Maritime Commission*, 351 F.2d 756 (D.C. Cir. 1965).

51. *Investigation of Passenger Steamship Conferences Regarding Travel Agents*, 10 F.M.C. 27, 34-35 (1966).

52. *Aktiebolaget Svenska Amerika Linien v. Federal Maritime Commission*, 372 F.2d 932 (D.C. Cir. 1967).

"The Commission has formulated a rule that conference restraints which interfere with the policies of antitrust laws will be approved only if the conferences can 'bring forth such facts as would demonstrate that the . . . rule was required by a serious transportation need, necessary to secure important public benefits or in furtherance of a valid regulatory purpose of the Shipping Act.'

\* \* \* \* \*

"[O]nce an antitrust violation is established, this alone will normally constitute substantial evidence that the agreement is 'contrary to the public interest' unless other evidence in the record fairly detracts from the weight of this factor. . . . We therefore hold that the antitrust test formulated by the Commission is an appropriate refinement of the statutory 'public interest' standard." (36 U.S.L.W. at 4215.)

Unlike other types of Section 15 agreements, a merger agreement ends all present and potential competition between the parties, and the merger is irrevocable once consummated pursuant to the Commission's Section 15 approval. As we have already noted, the Commission itself concedes that merger agreements "are perhaps the most anticompetitive of them all" (R.D. 36, p. 6).

Although the nation's antitrust policies respecting various kinds of agreements subject to the Commission's jurisdiction may be in doubt, this is not the case with mergers. Section 7 of the Clayton Act clearly prohibits mergers of any kind when the effect thereof "may be substantially to lessen competition, or to tend to create a monopoly" (15 U.S.C. § 18). The decisions of the Supreme Court in recent years have made clear that any merger among relatively large companies in any line of commerce raises grave questions of legality under Section 7 of the Clayton Act.<sup>53</sup> Thus, the Commission has the obligation to be doubly vigilant to protect the standards of Section 15 in its exercise of merger jurisdiction, for "integration by merger is more

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53. *United States v. Third National Bank in Nashville*, 36 U.S.L.W. 4178 (U.S. March 4, 1968); *United States v. Pabst Brewing Co.*, 384 U.S. 546 (1966); *United States v. Von Grocery Co.*, 384 U.S. 270,

suspect than integration by contract, because of the greater permanence of the former.” *United States v. Philadelphia National Bank*, 374 U.S. 321, 366 (1963). Having in mind that one of the fundamental purposes of Section 15 was to permit cooperative agreements among competing carriers so that the tendency to merge would be discouraged, it would seem ironic for the Commission to apply a less stringent standard of approvability to mergers than to cooperative agreements.

The status of the applicants in this case as operating-differential subsidy (ODS) contractors under Title VI of the Merchant Marine Act, 1936 (46 U.S.C. § 601 et seq.) provides a special reason for requiring a strong showing from the merger applicants that the proposed merger is in the public interest. Thus, the Maritime Administration, the agency responsible for administration of this nation’s subsidy program, has rejected a “chosen instrument” policy, whereby American flag subsidized competition *inter se* would be limited, and has held that competition between subsidized U. S. flag operators on this nation’s essential foreign trade routes is desirable. In *United States Lines—Subsidy, Route 12*, P.&F., 5 SRR 151 (MSB 1964), reversed and remanded in part, 5 SRR 671 (Secretary of Commerce, 1964), original decision reaffirmed, 5 SRR 969 (MSB 1965), the Board granted applications to three separate companies to provide new subsidized services on Trade Route 12 over objection of one of the applicants that competition among subsidized U. S. flag lines would be undesirable. The Board rejected that argument, stating, in part, as follows (5 SRR at 156-57):

“[I]f Section 605(c) was deemed a bar to the subsidization of the additional services by AEL and Waterman the effect would be to accord USL a veritable ‘chosen instrument’ position on Trade Route 12. We believe that an increase in U.S.-flag participation in this market can better be obtained through competition between U.S.-flag carriers which

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277-78 (1966); *United States v. Aluminum Co. of America*, 377 U.S. 271, 280 (1964); *United States v. Philadelphia National Bank*, 374 U.S. 321, 365 at nn. 41-42 (1963); *Brown Shoe Co. v. United States*, 370 U.S. 294, 322 (1962).

invites comparison between equipment, sales effort, timing of sailings, and initiative of management, officers and crew.

"Unfortunately, the differential character of the operating subsidy program, while providing assistance to the carriers, does not appear to furnish a sufficient incentive for the U.S.-flag carriers to increase their participation in U.S. foreign commerce. It is our hope that the spur of intra-U.S. flag competition among rival managements and labor forces, each seeking to obtain a larger share of the trade for its company, will redound to the overall benefit of the Merchant Marine and the foreign commerce of the U.S."

Indeed, APL, one of the merger applicants in this case, opposed the grant of ODS to Pacific Transport Lines, Inc., the predecessor in interest of States Steamship Company, and to PFEL, one of the other applicants for merger in this case. APL contended that additional subsidized sailings on Trade Route 29 should be awarded to it rather than the competitive applicants if such additional service was warranted. The Board rejected this "chosen instrument" argument and the notion that "APL . . . has the primary responsibility for maintaining and developing the vast commerce on the route" and reaffirmed its authority and preference for "granting dual and multiple subsidies" on a given route. *Pacific Transport Lines, Inc. and Pacific Far East Line, Inc.—Subsidy, Route 29*, 4 F.M.B. 7, 17-18 (1952). Further, some five years later, all three of the merger applicants in this case unsuccessfully opposed the grant of an ODS contract to States, the only other subsidized U. S. flag line that will be left to provide substantial California-Far East competition with the merged company. *States Steamship Co.—Subsidy, Pacific Coast/Far East*, 5 F.M.B. 304, 307-08 (1957). Merger among these applicants would tend to nullify the policy that prompted the Maritime Administration's grant of subsidy to these separate companies in the first place.

Finally, a merger among competing companies quite obviously presents a whole range of problems that are not presented by the types of agreement customarily scrutinized by the Commis-

sion pursuant to Section 15. We have argued in Part I of this brief that the absence of any specific merger guidelines in Section 15 is strong evidence that the Commission is not to exercise merger jurisdiction. Nonetheless, the Commission and the merger applicants may not have it both ways. If the Commission is to exercise merger jurisdiction and confer antitrust immunity upon the merger, then it must consider and weigh all ramifications of the merger in determining whether it is contrary to the public interest. It may not ignore these other considerations on the ground they are not specified in the statute.

In this regard, the Commission might appropriately have considered the guidelines suggested by the Inter-Agency Committee on Transport Mergers appointed by President Kennedy in 1962. The criteria recommended by the Committee were intended primarily for exercise of the merger jurisdiction over the rail and air transport industries expressly conferred by the Interstate Commerce Act and Federal Aviation Act. However, the Committee did suggest that "these criteria have general applicability to mergers occurring in other modes of transport", though it recognized that "the particular character of one or more of these other modes may call for some modification of the criteria here set forth" (109 CONG. REC. 3671 (1963)). Among the criteria suggested by the Committee, which would obviously have applicability here, are the following:

"1. Will the proposed merger restrict effective competition in the provision of transportation services in the areas affected?

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"4. Will the cost and quality benefits resulting from the merger be reflected in benefits to the public?

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"6. Will the proposed merger serve the long-run interests of both the public and the carriers concerned, or is it merely an attempt to meet a short-run crisis arising either because of unfavorable economic conditions in general or a particular transitory problem?

"7. Is the merger proposed, in part, because of the imminent failure of one or more of the merging carriers, and is it the most appropriate solution to this difficulty?

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"9. Does the merger provide adequate protection and assistance to affected employees, and take into account community employment effects?

"10. Will the proposed merger serve other objectives of public policy, including a reduction in public subsidies?" (Id.)

If the Commission is to give consideration to such criteria bearing on the public interest as those enumerated above, it is quite obviously incumbent upon the Commission to require that the merger applicants establish to the satisfaction of the Commission that the merger is fully justified in the light of these criteria.

#### **B. THE COMMISSION ERRONEOUSLY ASSESSED THE STANDARDS APPLICABLE TO APPROVAL OF MERGERS.**

At the outset of its discussion of the "Standards for Decision", the Commission suggests that the standards for approvability of Section 15 agreements elaborated in the *Mediterranean Pools* case, discussed above, are applicable only in the case of "an agreement that is on its face a per se violation of the antitrust laws," and hence that merger applicants need not establish that the merger is necessary to produce important public benefits or is based upon a serious transportation need (R.D. 43, p. 30). The Commission next asserts that while it "is not to measure proposed agreements by the standards of the antitrust laws," it may not "ignore their policy" (R.D. 43, p. 31).

There follows a discussion of Section 7 of the Clayton Act and the market analysis principles routinely applied for determining the probable effect of a merger (R.D. 43, pp. 31-43). The Commission concludes upon tentative application of these principles to the instant merger that, on the one hand, an aggregate market share of 26.1% of the liner cargo business in the Califor-

nia-Far East trade to be commanded by the merged company “represents a high degree of concentration”; but that, on the other hand, the 7.8% share of the “liner-plus-non-liner market” to be commanded by the merged company “gives no cause for concern. . . .” However, the Commission declines to say what it regards the relevant market to be on the ground that that question is “by no means controlling as to the public interest. . . .” (R.D. 43, p. 35.)

The Commission then enumerates essentially four factors which it believes mitigate the degree of concentration: (a) The “nature of the shipping industry”; (b) “the declining share of cargoes carried by U.S. flag vessels on TR 29”; (c) improvements in economy and efficiency that would result from the merger, a presumed merger benefit in the public interest for which the Commission finds support in cases under the Interstate Commerce Act; and (d) the existing degree of concentration among the three merger applicants (R.D. 43, pp. 38, 40, 41, 42). (We discuss (a) through (d) under Subsection 2 below.)

It is thus apparent that the Commission did not think it necessary to find the merger justified by an urgent transportation need or for the realization of an important public benefit. We shall now demonstrate that each of its stated reasons for not doing so is wrong.

# **1. The Commission's Asserted Basis for Applying a Less Rigorous Test to Mergers Cannot Stand.**

## **a. The Commission's Per Se Antitrust Rule Is Wrong.**

We think it apparent from our discussion under Section A above that the rule of the *Mediterranean Pools* and *Travel Agents* cases is, if anything, more clearly applicable to the agreement here under consideration than it is to any other kind of agreement. To the extent the Commission's suggestion that the rule does not apply to mergers is based upon the court of appeals' decision in the *Travel Agents* case (R.D. 43, p. 30), which has subsequent to the Commission's decision herein been reversed by the Supreme Court, it is obviously misplaced.

Nor is the Commission's position aided by its suggestion that the *Mediterranean Pools* case was limited to *per se* violations of the antitrust laws (R.D. 43, p. 30). Although the agreements in *Mediterranean Pools* were obviously highly anticompetitive, we know of no cases holding revenue pooling agreements to be *per se* violations of the antitrust laws any more than any merger agreement, a pooling of all resources by the merging companies, is *per se* unlawful. Further, the *Mediterranean Pools* decision stated that it was describing the "ground rules" applicable to all Section 15 agreements (9 F.M.C. at 288). It seems apparent that all anticompetitive combinations are not also *per se* violations of the antitrust laws. This is confirmed by the Supreme Court's decision in the *Travel Agents* case, which characterized the rule as applying with respect to "restraints which interfere with the policies of antitrust laws" and "once an antitrust violation is established" (36 U.S.L.W. at 4215).

Indeed, the Commission itself concedes its obligation to consider the policy of the antitrust laws in any Section 15 proceeding (R.D. 43, p. 31), a duty that is inconsistent with ignoring all but *per se* antitrust violations. We submit that the rule of the *Mediterranean Pools* case is quite evidently as applicable to mergers as to other "anticompetitive combinations", which "presumptively run counter to the public interest. . . ." (9 F.M.C. at 290.)

**b. The Commission Did Not Find the Effect of the Merger Upon Competition to Be Insignificant.**

Assuming, for purposes of argument, that the showing required to justify a merger having an insignificant effect upon competition would be much less than might otherwise be required, it is perfectly clear that the Commission made no such finding in this case. As we have already noted, the Commission declined to state what markets it regarded as being relevant for purposes of assessing the effect of the merger upon competition. The Commission said that it is sufficient to indicate the "danger areas" and that it need not determine the degree of concentration in the relevant market in order to determine whether the merger is in the public

interest.<sup>54</sup> Inasmuch as one of the “danger areas” detected by the Commission was the liner cargo market in the California-Far East trade, for which it found the merger would produce a “high degree of concentration” (R.D. 43, p. 35), this Court could not properly assume for purposes of judicial review that the degree of concentration produced by the merger would be insignificant. It would be for the Commission to make such a determination in the first instance. *Alaska Steamship Co. v. Federal Maritime Commission*, 344 F.2d 810, 825-26 (9th Cir. 1965); *Anglo-Canadian Shipping Co., Ltd. v. Federal Maritime Commission*, 310 F.2d 606, 613-17 (9th Cir. 1962).

Further, we think it clear that a proper appraisal of competitive effect requires the Commission to assess the effect of the merger on competition in the light of the California-Far East liner and U. S. flag liner cargo markets. The Commission’s efforts to diminish the importance of these particular markets are erroneous, as we now demonstrate.

The Commission determined that the relevant geographical market would be “that portion of the United States which utilizes ocean transportation of freight between California and the Far East,” and then discusses several possible relevant service markets (R. D. 43, p. 33). The Commission suggests that “settled consumer preference” is an appropriate test for determining the relevant service market (R. D. 43, p. 33), but inconsistently concludes that service by U. S. flag liners is not an appropriate market. The Commission correctly recognizes that “priority given by law to United States flag vessels with respect to MSTs and other government or ‘preference’ cargo . . . practically excludes the competition of foreign flag lines” (R. D. 43, p. 34), and it is undisputed in the record that MSTs and Government preference cargo con-

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54. The Commission purported to follow doctrine applicable to ICC merger cases (R.D. 43, pp. 36-37), but ignored the part of that doctrine which calls for identification of “danger areas” by *determination* of market concentration through traditional market analysis concepts. *Great Northern Pacific & Burlington Lines, Inc.—Merger—Great Northern Ry. Co. et al.*, 328 I.C.C. 460, 511-18 (1966).

stitute a substantial portion of the liner cargo carried in the California-Far East trade (R. D. 43, App. F; Tr. 1085-89). This fact alone would seem to compel the conclusion that there is a very significant consumer preference for U. S. flag liner service.<sup>55</sup> Further, the Commission ignores the well-known fact of a strong national preference on the part of commercial shippers in foreign countries for the vessels of their own flag, which effectively isolates U. S. flag liners to a distinct cargo market as to which they can compete on equal terms, principally among themselves.<sup>56</sup> We have already noted the importance that the Maritime Administration has attached to maintaining competition among U. S. flag liners on this nation's essential trade routes (pp. 47-48, *supra*), and it seems pertinent to note that the CAB has long since decided that monopoly power among U. S. flag foreign commerce carriers is not offset by the existence of foreign flag competition. *Northeast Airline, et al. North Atlantic Routes*, 6 C.A.B. 319, 325 (1945). The Commission's failure to regard as highly significant the fact that the three merger applicants combined will have, respectively, 52% and 68% of the westbound and eastbound U. S. liner cargo market in the California-Far East trade is inexplicable (R. Exs. 32, 37; D. 43, App. G).

Having erroneously concluded against a relevant U. S. flag liner service market, the Commission undertakes the problem of cross-elasticity between liner and non-liner carriage. It finds "a substantial 'cross-elasticity of demand' between liners and non-liners" and "that the services are interchangeable to a very sub-

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55. The Commission also notes that MSTs has recently established a competitive bidding system for the carriage of its cargo, but wholly fails to assess the effects of intentionally enhancing the merger applicant's financial strength and general competitive position vis-a-vis their U. S. flag competitors. Since the Government has already determined to allocate MSTs cargo on the basis of competitive bids, competitive power rather than Government direction will determine which U.S. flag liner carries this cargo (R.D. 43, p. 34).

56. The Supreme Court discussed the importance of flag preference in the steamship industry in its decision in *Federal Maritime Board v. Isbrandtsen Co.*, 356 U.S. 481, 484-86 (1958).

stantial extent" (R.D. 43, pp. 34-35). These conclusions are based upon percentage of traditional liner (commercial general) and non-liner (bulk) cargoes carried by non-liners and liners, respectively, and on an apparent loss of cargo by U. S. flag liners to foreign flag non-liners. However, the Commission's own decision shows that only 10% of westbound bulk cargo is carried on liners in the trade, and only 15% of westbound commercial general cargo is carried in non-liners. (R.D. 43, App. F.) These are far below the cross-elasticity percentages of interchangeable use found to establish a combined relevant service market in *United States v. Aluminum Co. of America*, 377 U. S. 271, 275-77 (1964).<sup>57</sup> In the light of these figures and the fact that 94% of all bulk cargo movement is in the Westbound trade (R.D. 43, App. F), it is clear that U. S. flag liner "losses" of cargo to non-liners since 1954 are representative of a tremendous growth of bulk cargo and corresponding non-liner carriage in the trade (R. Exs. 37, p. 3; 80). Rather than showing increased cross-elasticity, this situation is a clear demonstration of the lack of competition between liners and non-liners.

The Secretary of Commerce has decided that cargo carried by non-liners is not generally susceptible of carriage by U. S. flag liner vessels in Maritime Administration determinations of subsidy awards to promote adequate U. S. flag liner service on the nation's foreign trade routes. *United States Line—Subsidy, Route 12, P.&F.*, 5 SRR 671, 674 (Secretary of Commerce 1964). The Commission's own decision in this case spells out the characteristics of the services which make them non-competitive for the same classes of cargo.<sup>58</sup>

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57. The eastbound movement, which shows more apparent cross-elasticity, really reflects the consumer preferences of Far East shippers, including foreign flag preference, since there is virtually no U.S. flag non-liner eastbound carriage of either commercial general or bulk cargo. (R.D. 43, App. E.)

58. "Non-liner rates are lower than liner rates as a rule, while liners provide greater speed, generally with regularly scheduled service" (R.D. 43, p. 35).

**2. The Commission's Grounds for Mitigating the Effect of the Merger Are Impermissible.**

**a. The "Nature of the Shipping Industry" Does Not Provide a Proper Basis for Discounting the Anti-Competitive Impact of the Proposed Merger.**

The Commission discounts "the significance of respondent's aggregate share of the market" because of "the nature of the shipping industry", referring to the Commission's regulatory authority and asserted ease of market entry for new competitors (R. D. 43, p. 38).

The Commission reasons that, although foreign commerce shipping rates are "not as strictly regulated and supervised as in domestic transportation," Commission approved conference rate agreements make "virtually impossible" single carrier control of cargo rates and practices, and are an "effective safeguard against the evils attending monopoly." (R. D. 43, p. 38.) In support of this conclusion the Commission cites *McLean Trucking Co. v. United States*, 321 U.S. 67, 85 (1944), which used the last-quoted language in the context of the ICC's direct power to control rates in domestic commerce. By contrast, the Commission has no power to control rates in foreign commerce,<sup>59</sup> but it only has power to approve or disapprove *voluntary* agreements to fix rates. It is upon these voluntary agreements that the Commission rests its case for effective rate regulation. Nothing could be better calculated to disrupt the conference rate agreement system than the concentration of substantial competitive power in the hands of a single carrier.<sup>60</sup>

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59. Except to disapprove rates "so unreasonably high or low as to be detrimental to the commerce of the United States" (46 U.S.C. § 817 (b)(5)). Compare the Commission's power over *domestic* commerce water carriers to establish "just and reasonable maximum rate(s), fare(s), or charge(s)" (46 U.S.C. § 817(a), 46 U.S.C. § 845a). An approved conference agreement to fix rates leaves the parties free to raise or lower rate levels without any action by the Commission under Section 15 (46 U.S.C. § 814).

60. *Cf. Federal Maritime Board v. Isbrandtsen Co.*, 356 U. S. 481, 486 (1958), which suggests conference rate systems are vulnerable to an

Unlike the Commission, the ICC has the power to compel service by carriers and directly to regulate market entry. *Florida East Coast Ry. Co. v. United States*, 259 F.Supp. 993, 1009 (M.D. Fla. 1966), *aff'd per curiam* 386 U.S. 544 (1967). Somewhat more analogous, perhaps, is the CAB's regulation of air carriers in foreign commerce. The CAB has stated that regulation in foreign commerce is ineffective as a substitute for competition because the Board is without power to regulate rates and to compel service by foreign air carriers.<sup>61</sup>

The Commission's reliance upon an asserted ease of entry of steamship operators into the foreign trade is quite clearly misplaced. The ease of entry to which the Commission refers (R.D. 43, p. 39) pertains to entry by non-liner operators. The Commission apparently acknowledges that "it costs a great deal to set up and operate a regularly scheduled liner service" (R.D. 43, p. 39). This is confirmed by the large capital commitment required by Matson to start up a relatively small liner service in the California-Far East trade.<sup>62</sup>

The Commission also regards "the existence of inter-flag competition" as a further factor diminishing the significance of the merger applicants' market share (R.D. 43, p. 39). Inasmuch as the market shares considered by the Commission already reflect the amount of cargo carried by foreign flag operators, it is difficult to see how the existence of such foreign competitors could be regarded as an off-set for the merger applicant's market share. The

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outside competitor with substantial market power and a pervasive service system. One of the merger applicant's own witnesses stated that increased financial strength from merger would be "exceedingly important" in "rate wars" resulting from "opening of the rates by the Conference." (R. Tr. 1030-32.)

61. *American Export Airlines, Inc. Trans-Atlantic Service*, 2 C.A.B. 16, 32 (1940). The CAB has the same control over carrier rate agreements in foreign commerce under Section 412 of the FAA (49 U.S.C. § 1382) that the Commission has under Section 15.

62. Matson had made a capital commitment of \$46 million to start up a service employing only two vessels operating in the trans-Pacific trade (R. Ex. 152).

merger is certainly not likely to increase the competitive ability of foreign flag competitors.

**b. Promotion of the Merger Applicants Is Not a Proper Consideration.**

Referring to the declining percentages of commercial liner cargo carried by the United States flag vessels between 1954 and 1964 and recent mergers among Japanese lines, the Commission asserts that "it would serve the public interest of the United States to permit a merger that would improve the efficiency and ability to compete of U. S. flag vessels serving this as well as less profitable trades" (R.D. 43, p. 40). The Commission then asserts that this consideration is not inconsistent with its responsibility to avoid promoting one group of carriers to the exclusion of others, because it is concerned solely with the weight to be given a facet of anti-trust policy that is not applicable to foreign carriers. It seems to us that there are a number of infirmities in this analysis.

First, the evidence shows, as the Commission itself found (R.D. 43, p. 18), that the Japanese mergers were prompted by the imminent financial collapse of several of the lines involved. This is a circumstance that would have justified the Japanese mergers under the familiar "failing company" doctrine of our antitrust law. *Brown Shoe Co. v. United States*, 370 U.S. 294, 319 (1962); *International Shoe Co. v. FTC*, 280 U. S. 291, 302 (1930). But there is no similar justification for the instant merger (R. Tr. 812). Nor is the present concentration among Japanese carriers sufficient to justify the instant merger, inasmuch as the Commission found "the record does not indicate that any respondent or other American flag carrier has been affected as a result" of the Japanese mergers (R.D. 43, p. 18).

Second, the Maritime Administration is vested with the "promotional" functions under the Merchant Marine Act, 1936, and the Shipping Act, while the Commission is to devote itself to "regulatory" functions.<sup>63</sup> We have already referred to the Mari-

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63. Reorganization Plan No. 7 of 1961 (75 Stat. 840); and see Message from President John F. Kennedy to Congress dated June 12, 1961, 107 CONG. REC. 9366, H.R. DOC. NO. 187, 87th Cong., 1st Sess. (1961):

time Administration's policy of encouraging competition among subsidized operators for the purpose of increasing the share of cargo carried by U. S. flag operators. It is obviously inappropriate for the Commission to decide merger cases on the basis of a promotional policy for which it has no responsibility.

Finally, the Commission ignores the interests of competing United States flag lines who are not at this stage included in the merger. The presumed answer for those lines would be themselves to seek merger partners for the purpose of increasing efficiency and eliminating "wasteful competition". The ultimate end of such a policy would be the merging of all U. S. flag carriers into a single entity.

**c. Improvements in Efficiency and Economy Could Not in Themselves Justify the Merger.**

It seems a self-evident proposition that improvements in economy and efficiency do not rise to the dignity of an urgent transportation need or an important public benefit. This would be so only if it were additionally shown that the carriers were in difficult financial straits or that service to shippers was jeopardized by inefficiencies. This is the whole thrust of the decisions discussed under Section A, above.

The Commission's reliance on decisions under the ICA in this regard is misplaced. The authority contained in the ICA for the ICC to approve mergers among railroad carriers is the manifestation of a long-standing congressional policy of *encouraging* mergers among railroads. When this policy was first adopted by Congress in 1920, it marked a sharp departure from the earlier policy of regarding competition as the desideratum of our railroad

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"Intermingling of regulatory and promotional functions has tended in this instance to dilute responsibility and has led to serious inadequacies, particularly in the administration of regulatory functions. Recent findings . . . point to the urgent need for a reorganization to vest in completely separate agencies responsibility for (1) regulatory functions and (2) promotional and operating functions."

In the 1950 Reorganization Plan, to which the 1961 Plan refers, Section 15 administration is listed as a regulatory function. (Reorganization Plan, No. 21, 1950, 64 Stat. 1274-75.)

economy, and the Act then adopted specifically directed the Commission to develop a plan for consolidation of the railroads of the United States into a "limited number of systems" (41 Stat. 481). In the Transportation Act of 1940 the ICC was relieved of its responsibility to develop a plan of consolidation, but the Act "expresses clearly the desire of the Congress that the industry proceed toward an integrated national transportation system through substantial corporate simplification."<sup>64</sup>

In contrast, the Congress that adopted the Shipping Act regarded preservation of competition in the shipping industry as a desirable goal and sought to create a regulatory climate that would discourage the tendency toward wholesale mergers among competing lines. (See discussion at pp. 16-18, *supra*.) It must be supposed there is an entirely proper area for the consolidation of operations and the merger of steamship companies. The development of new transportation systems, with the elimination of horizontal competition absent or, to the extent involved, justified by a showing of public benefit or transportation need, or the integration of passenger services, may be considered as examples. Of course, none of these factors has been established in this case. The lack of congressional guidelines in this area confirms, in our view, not only that Section 15 does not encompass mergers, but also that the same policies motivating Congress in enacting the merger provisions contained in the ICA were not before, or considered by, Congress in adopting Section 15.

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64. *Baltimore & Ohio R. Co. v. United States*, 386 U.S. 372, 387 (1967). *Accord*, *Maintenance Employees v. United States*, 366 U.S. 169, 173 (1961); *County of Marin v. United States*, 356 U.S. 412, 417-18 (1958). For a brief summary of the history of the consolidation provisions of the Interstate Commerce Act, see *St. Joe Paper Co. v. Atlantic Coast Line R. Co.*, 347 U.S. 298, 315-321 (1954).

Even so, the I.C.C. will not "depreciate the values of competition . . . reflected in the financial health of the merger applicants", *Great Northern Pacific & Burlington Lines, Inc.—Merger—Great Northern Railway Co.*, 328 I.C.C. 460, 525 (1966). See also *Southern Pacific Co.—Control—Western Pacific R. Co.*, 327 I.C.C. 387, 404-05 (1965). So-called "economy and efficiency" consolidations were disapproved in both these cases.

**d. The Existing Degree of Concentration Among the Merger Applicants Is Not a Justification for Merger.**

After a discussion of the merger "benefits" the decision advances its final reason for discounting the anticompetitive effects of the merger. As we understand this reasoning, it is that the legality of all prior acquisitions of stock leading to concentration among the three companies is to be presumed, and the only thing now cognizable under the antitrust laws or the Shipping Act is the incremental effect on competition of the final step here contemplated. Thus, the decision asserts that "the presence of AML as a separate party to the merger agreement is of little practical significance under the Act," for the reason that APL already owns 93% of AML's stock (R.D. 43, p. 42).

It could also be added that Natomas and Mr. Davies combined already own 51% of APL's stock and 43% of PFEL's stock. In both instances, this constitutes control (R.D. 43, p. 4). But these are not reasons for discounting the anticompetitive consequences of the arrangements. None of these stock acquisitions was ever approved by the Commission, nor has any been called upon to pass muster under the antitrust laws (R. Tr. 59-60). There is certainly no doctrine that excludes prior acquisitions from the reach of the antitrust laws. Indeed, even a merger lawful when entered into is subject to being later found in violation of Section 7 of the Clayton Act. *United States v. E. I. duPont de Nemours, Inc.*, 353 U.S. 586, 597-98 (1957).

**C. THE COMMISSION'S DECISION FAILS TO MAKE REQUISITE FINDINGS OF PUBLIC BENEFIT OR TRANSPORTATION NEED FOR THE MERGER.**

Consistent with its conclusion that applicants need not justify the proposed merger as being necessary to accomplish some recognizable objective of the Shipping Act, the Commission in fact makes no findings that the public interest or the needs of the nation's transportation system require the merger. Rather, it simply concludes that the "benefits of the merger outweigh any potential injury" (R.D. 43, p. 43). It is clear, even so, that the principal "benefit" is to be found in the supposed increased

"efficiency" of operation and financial savings resulting primarily from the elimination of employees.<sup>65</sup>

Absent from the Commission's decision, as well as from the record evidence, is any showing that the various improved "efficiencies" are in any way required for any of the merger applicants to continue as highly effective and prosperous steamship operators, fully capable of developing their respective fleets and services as may be determined desirable. Indeed, not only has each of the applicants realized substantial earnings over the years, but the foreign trade steamship services of each are underwritten by the United States Government in the form of operating-differential subsidy contracts, and substantially all of their vessels have been built with the aid of construction-differential subsidy (R. Exs. 41, pp. 1-4; 43A, 43C, 91, 176).<sup>66</sup>

65. The decision contains a section entitled "Benefits of the Merger" (R.D. 43, pp. 13-18), which paraphrases a similar division in applicant's brief to the Examiner and lists essentially the same six "benefits," *i.e.*, improved management, administrative economies, improved sailing coordination, increased financial strength, enhanced ability to meet changes in transport methods, and the Japanese mergers. We confess some puzzlement at the classification of the Japanese mergers as one of the "Benefits of the Merger".

66. The Commission concedes that each of the merger applicants "is in good financial condition" (R.D. 43, p. 16). The record bears the Commission out many fold (R. Exs. 16, 18, 20, 21):

(1) In 1965 the net earnings and return on common equity for each of the three applicants was as follows:

	Net Earnings (\$000)	Return on Common Equity Per Cent
AML .....	3,219	12.0
APL .....	5,471	9.6
PFEL .....	4,617	17.2

(2) Each company had substantial retained earnings at the end of 1965 as follows:

AML .....	\$25,448,000
APL .....	\$55,531,000
PFEL .....	\$23,483,000

(3) Each company receives substantial amounts of operating-differential subsidy from the Government, amounting in 1965 for each company as follows:

AML .....	\$ 6,578,000
APL .....	\$19,791,000
PFEL .....	\$ 6,734,000

We assume for purposes of the ensuing discussion that applicants would save as a result of merger approximately \$950,000 annually by eliminating from the shipping industry administrative personnel now required to maintain applicants' separate, competing organizations (R.D. 43, pp. 13-14), that there would be other unmeasurable financial benefits resulting from consolidation of respondents' subsidized assets (R.D. 43, pp. 16-17), and that combination of the three fleets would provide greater scheduling flexibility (R.D. 43, p. 15). We next ask, who would benefit from, and what is the need for, these increased efficiencies?

The Commission does not rely heavily upon the "benefit" of strengthened management noting that "the three companies have been and are now well managed", that the real benefit would be increased "management capacity" resulting from "optimum utilization of the best managerial talent of all three companies" and that no further demonstration of management benefits was offered or required because "it was not in the best interests of the companies to be specific" (R.D. 43, pp. 13-14). The Commission did not consider the public and national defense interest in maintaining a broad base of management personnel in the shipping industry of the United States or whether management improvements could be accomplished by means other than merger.

There is certainly substantial question whether elimination of management personnel is beneficial or detrimental to the public interest. The CAB has considered that establishment of competitive U.S. flag foreign commerce carriers is desirable because of the national defense interest in "training of additional American supervisory . . . personnel." *American Export Airlines, Inc., Trans-Atlantic Service*, 2 C.A.B. 16, 33 (1940). The Supreme Court recently held that mergers among banks, a "highly regulated industry,"<sup>67</sup> cannot be justified in the interest of curing management deficiencies unless there is a showing of reasonable efforts to cure these problems by other means. *United States v. Third National Bank in Nashville*, 36 U.S.L.W. 4178, 4183-84 (U.S. March 4, 1968).

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67. *United States v. Philadelphia National Bank*, 374 U.S. 321, 372 (1963).

The Commission concludes it is not material that the stockholders of the merging companies will benefit from the economies to accrue from the merger because efficiency and economy are inherently in the public interest, relying on Interstate Commerce Commission merger cases (R.D. 43, p. 41). The decision then refers to its earlier discussion of merger benefits, noted above.

While it may not be material in an invidious sense that applicants' stockholders will be the principal financial beneficiaries of the merger, it *is* material that the economies producing these stockholder benefits are not necessary for any other purpose. As we have already discussed (pp. 59-60, *supra*), we must deny that there is any public interest under the Shipping Act in effecting anticompetitive agreements solely for the sake of economic benefit to those so agreeing or combining.<sup>68</sup>

In its earlier discussion of the "benefits" (R.D. 43, pp. 16-17), the Commission makes an apparent effort at least to suggest the existence of a need for greater financial strength. Thus, after finding that "each of the three respondents is in good financial condition, and they do not assert to the contrary," the decision lists a series of countervailing makeweights, as follows:

a. In a seeming effort at once to minimize the applicants' financial strength and to denigrate the substantial tax advantages that accrue to applicants from their subsidized status, the Commission advances the highly dubious proposition that applicants' statutory reserves "would become, to a considerable extent, sub-

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68. Certainly no such suggestion arises from Seaboard Air Line R. Co.—Merger—Atlantic Coast Line, 320 I.C.C. 122 (1963), upon which the initial decision so heavily relies. There the Commission specifically stated that its decision was predicated on "the beneficial effects this proposed merger will have upon rail patrons and the public generally rather than upon the financial gains that may accrue to the stockholders of the merged company" (320 I.C.C. at 161).

As the Supreme Court has recently held in a case where it was argued that substantial lessening of competition was overcome by increased financial strength of the merged company, the merging companies must show specific "beneficial consequences" and the "value of these additions" to the public rather than the stockholders of the merging companies, *United States v. Third National Bank in Nashville*, 36 U.S.L.W. 4178, 4182-84 (U.S. March 4, 1968).

ject to Federal income tax if used for purposes other than new vessel construction (R.D. 43, p. 16).<sup>69</sup> Even if this were true, the availability of a tax free fund for new vessel construction could hardly be regarded as a financial hardship to a steamship company.

b. The decision then devotes a paragraph to the problems that some of applicants have had in collecting current ODS as a result of alleged quarrels with the Maritime Administration, and suggests that the exigencies created thereby would be ameliorated by merger and the consequent creation of a "common till" for subsidy funds (R.D. 43, p. 16). As a study in administrative consistency, it is interesting to compare the discussion of this somewhat tenuous and speculative "benefit" arising from the merger of subsidy funds with the decision's earlier forthright rejection of the suggestion that the Commission should consider the consequences of a substantial loss in Government recapture of subsidy money resulting from consolidation of the subsidy funds into a common till (R.D. 43, pp. 12-13).<sup>70</sup>

c. The decision asserts that the abnormal demands of Vietnam contribute to the present prosperity of applicants but makes no reference to the evidence that earnings and vessel utilization were reasonably good before this nation's sharply escalated involve-

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69. As subsidized operators, respondents' earnings deposited in their reserve funds avoid all current federal income taxes and are tax deferred under Section 607(h) of the Merchant Marine Act, 1936 (46 U.S.C. § 1177). As a practical matter, no federal income taxes will be paid on such funds so long as respondents continue to operate as subsidized steamship companies.

70. Thus, the decision correctly notes that the immediate effect of creating a merged recapture status for the three lines would be the elimination of a substantial amount of Government recapture of excess earnings from PFEL (although the more current figure is \$5,809,000 as of December 31, 1966 (R. Ex. 62; Tr. 941-42), rather than the \$3,465,000 referred to in the decision), but then expresses the hope that this particular consequence would be ameliorated by increased earnings and by the special intercessions of the Maritime Administration, and finally concludes that "protestants' contentions of probable detriment to the public interest in connection with the ODS contracts of respondents are without substantial merit".

ment in Vietnam (R. Exs. 175; 104A, p. 19; 41, pp. 1-3; 104B, p. 7) and that the westbound movement of commercial general cargo has continued to increase (R. Ex. 37, pp. 1, 3-4).

d. Finally, the Commission's decision asserts that "respondents are no exception to the general rule that shipping companies historically have not been attractive to investors" (R.D. 43, p. 16). This statement is apparently made in a very general sense without reference to the considerable interest that the Natomas Company, which presently controls all three applicant lines, has manifested in acquisition of their stock (pp. 3-4, *supra*). Moreover, there is no evidence that applicants have experienced difficulty in raising capital for new ship construction. (R. Tr. 200, 355-62; Exs. 16, pp. 2, 4; 18, pp. 2, 4; 20, pp. 2, 4.)

On the basis of the foregoing list of reasons, the initial decision concludes: "That the three respondents separately *are not in evident financial straits at the moment* is not reason to discount the benefit of improved financial strength" (R.D. 43, p. 16, emphasis ours). Of course, the record demonstrates that respondents have been in a good financial position for at least ten years and that their prospects for the future are extraordinarily good. The foregoing italicized characterization of that financial position must strike one as a rather remarkable understatement.

But assuming that the applicants' present good financial condition is not in itself reason for discounting a still greater enhancement of that financial position, we are still left to wonder what public benefit will result or transportation need thereby be served. The Commission suggests that applicants will have an "enhanced ability to meet expected changes in ocean transport methods" (R.D. 43, p. 16). Specifically, the decision refers to the trend toward containerization in the Pacific Coast/Far East trade; suggests that applicants' strengthened financial position "would facilitate" expenditures for necessary container vessels and equipment, and "that there may be some advantage" to a larger operator in acquiring priority use of shore-side facilities; and refers to Matson's arrangements with Japanese lines for use of shore-side facilities in Japan. Finally, the decision suggests that with a larger

fleet applicants will have a greater opportunity to develop specialized vessels (R.D. 43, pp. 16-17).

We submit that this kind of speculation hardly rises to the dignity of a finding that improvement in applicants' financial position is required for them to develop containerization and to keep abreast with modern technological changes. Indeed, applicants themselves have made no such claim (R. Tr. 254-58, 262; 400-02). PFEL has already placed an order for six LASH type vessels, and APL intends to construct similar type vessels as soon as construction subsidy funds become available (R. Tr. 792-95). It is clear that applicants have no intention to build vessels for use in the Far East trade until subsidy is made available therefor, whether or not the proposed merger is consummated (R. Tr. 254-63, 359-61).<sup>71</sup>

As for the suggestion that combination of carriers is desirable in developing shore-side facilities for containerization, there is no finding that elimination of competition among steamship companies is necessary for them to cooperate for that purpose. Indeed, applicants at the present time maintain a joint terminal facility in Los Angeles (R. Tr. 696). As the Commission's decision notes, Matson's plans for an unsubsidized Far East container service include cooperation with a Japanese line for the purpose of developing shore-side container facilities (R. Tr. 1761-65). On cross-examination, APL's president readily admitted that APL's planning for terminal facilities in Japan "would have to be in conjunction with other lines and probably with one or more of the large Japanese combines. I think we would find ourselves in the same position as Matson with NYK" (R. Tr. 401).<sup>72</sup>

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71. The ICC considers merger justified by investment needs when "profits are not sufficient . . . to make improvements important to the national interest." Penn-Central Merger Cases, 389 U.S. 486, 501 (1968). See also Penn-Central Merger Case, 327 I.C.C. 475, 499-501 (1966).

72. It is clear from the record (Tr. 400-01) that the Japanese Government will not permit a United States flag line to own terminal facilities in Japan, either independently or in conjunction with a Japanese line. Thus, under current Japanese policy, respondents will by necessity be required to cooperate with Japanese maritime interests for the development of shore-side facilities in Japan.

The only finding of a public benefit contained in the Commission's decision is the suggestion the merger will result in "improved transportation service, *to minor ports in particular*, through coordination of sailings" (R.D. 43, p. 41, emphasis ours). But at an earlier point the Commission's decision more accurately reflects the state of the record when it states that "alternating some of the *minor ports* among vessels of the combined fleet would, according to company estimates, *eliminate as many as two ports per voyage* with a consequent saving in turnaround time" (R.D. 43, p. 15, emphasis ours). APL's president estimated that by thus reducing the service at small ports, the combined fleet could increase its annual voyages from 90 to 94. He was not certain, however, whether the additional voyages would be made, but, in either case, the merged company's profits would increase. (R. Tr. 250; Ex. 12, pp. 10-11.)

While there can be little doubt that this practice of concentrating on high volume ports will tend to maximize applicants' profit, we hardly think this can be fairly characterized as an improvement in service to "minor ports in particular." On the contrary, it seems self-evident that this policy would not be beneficial to shippers who had grown accustomed to a regular service to marginal ports. As for the major ports, the service is so frequent already that it is doubtful the shippers would be materially affected even if applicants did increase service there (R.D. 43, App. D).

**D. THE COMMISSION ERRED IN FAILING TO COMPEL RESPONDENTS TO COME FORWARD WITH A PLAN FOR MERGER AND OTHER INFORMATION ESSENTIAL TO A FULL APPRAISAL OF THE MERGER.**

The Commission issued its approval of applicants' merger without *any* record evidence of the form which the merger would take, the terms of agreement governing the consolidation transaction, the plans for operation of the consolidated enterprise, applicants' plans for protection of displaced employees, and the impact of the merger upon subsidy recapture, as well as numerous other aspects of the merger. Because of this failure, the

Commission has given *carte blanche* to the merger without “pre-transaction scrutiny”<sup>73</sup> of the course applicants will actually follow under the umbrella of Commission approval.

It was to these deficiencies in the record and the Commission’s decision that Commissioner Hearn directed his dissent in this case (R.D. 43, pp. 48 et seq). This deficiency is underscored by the position taken by Commissioner Fansen, who joined the plurality opinion of the Commission on the basis that while “further evidentiary hearing could possibly uncover conduct contrary to the public interest . . . further delay in the instant proceeding is an unnecessary burden on the administrative process . . .” and it “is in the interest of maintaining the integrity of the administrative process that the litigation before us now be terminated.” (R.D. 43, pp. 45-46.) The Commission has thus abdicated the affirmative role the Commission or any agency charged with protection of the “public interest” must assume in developing a complete record upon which to render its decision.<sup>74</sup>

We next discuss the several respects in which the Commission failed completely to require the production of evidence essential to a full appraisal of applicants’ merger.

### 1. Plan and Terms of Merger.

Agreement No. 9551 asked for approval to “merge or consolidate . . . in the form and by the procedures as the directors and the stockholders of the three companies should approve” (R. Ex. 14, p. 2). The Commission was fully aware that it did not and

73. See R.D. 36, p. 12. The approval in this case was not only “pre-transaction” but pre-agreement, as well.

74. *Isbrandtsen Co., Inc. v. United States*, 96 F.Supp. 883, 892 (S.D. N.Y. 1951) (3-judge court), *affirmed by equally divided court sub nom A/SJ. Ludwig Mowinckels Rederi v. Isbrandtsen Co., Inc.*, 342 U.S. 950 (1952); *Anglo-Canadian Shipping Co. v. United States*, 264 F.2d 405, 411 (9th Cir. 1959). See also *Michigan Consolidated Gas Co. v. FPC*, 283 F.2d 204, 224 (D.C. Cir. 1960), *certiorari denied* 364 U.S. 913 (1960); *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608, 620 (2d Cir. 1965) (“The Commission must see to it that the record is complete. The Commission has an affirmative duty to inquire into and consider all relevant factors.”).

would not have a merger plan before it if it approved Agreement No. 9551 as submitted (R.D. 36, p. 3). As Commissioner Hearn noted, the applicants "apparently do not know yet what it [the plan] will be, in many respects" (R.D. 36, p. 25). Commissioner Hearn believed that the Commission was entitled to "at least as much information *prior* to its decision" as applicants' stockholders, the SEC, and various underwriters and banks will receive (R.D. 43, p. 49).

In *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213 (1966), the Court made it clear that only anticompetitive agreements actually filed with the Commission and specifically approved can be exempted from the antitrust laws. This scheme of regulation is based upon close administrative scrutiny of the arrangements between competing steamship lines. Again, in *Volkswagenwerk A.G. v. FMC*, 36 U.S.L.W. 4197, 4201 (U.S. March 6, 1968), the Court reversed a Commission policy of limiting its responsibilities under Section 15 and reaffirmed the congressional intent to "subject to the scrutiny of a specialized government agency the myriad of restrictive agreements in the maritime industry." If, as it claims, the Commission has jurisdiction over mergers under Section 15, it has the affirmative duty to demand that the actual merger agreement, embodying the plan for consolidation, be filed and closely examined before it invests the merger with antitrust immunity. Otherwise, the merger plan will remain an unfiled, yet supposedly approved, Section 15 agreement that has never been examined by the Commission.

The Commission's sister agencies, the ICC and the CAB, require that an agreed plan and terms of merger be filed and carefully examined under their respective merger jurisdictions.<sup>75</sup> The

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75. 49 C.F.R. §§ 52.2(c)(2), 52.3(b)(7); Seaboard Air Line R. Co.—Merger—Atlantic Coast Line, 320 I.C.C. 122, 143-46, 190-93, 198-99 (1963); Arizona-Monarch Merger, 11 C.A.B. 246, 260 (1950); Monarch-Challenger Merger, 11 C.A.B. 33, 34 (1949).

The ICC and CAB both require that merger applications include "just and reasonable" terms of payment or exchange of stock to protect the public interest (49 C.F.R. §§ 52.2(c)(2), 52.3(b)(7); Arizona-Monarch Merger, *supra*; TWA, Control by Hughes Tool Co., 12 C.A.B. 192, 197

plan of consolidation has been examined and approval conditioned on limitations even when no actual change in control was effected by the plan. *Pan American Airways, Inc., et al. v. Meyer*, 2 C.A.B. 503 (1940). Their practice stands in marked contradiction to the Commission's summary dismissal of this deficiency.

## 2. Plan of Operation for the Acquired Carriers.

Commissioner Hearn believed the Commission should insist upon "the service description of the merged company . . . especially as to the effect on itineraries due to LASH operations," and a description of how "the LASH operation [will] be integrated into the merged company" (R.D. 43, pp. 53, 54; D. 36, p. 27). Again the Commission was satisfied with the state of the record without that information (R.D. 43, p. 2). These questions were raised by the alleged "benefits" of the merger advanced by respondents in the first instance, principally the assertion that sailing coordination and removal of vessel overlap would be made possible as a result of the merger. (See R.D. 43, pp. 14-15.) As the Commission's decision reflects, this "benefit" was presented in general terms without any particular reference to the imminent inclusion in the merged fleet of LASH vessels or other types of container vessels.

Once again, the Commission considers its merger responsibilities are less demanding than those of its sister agencies. The CAB believes "it is necessary to consider the overall impact of the acquirer's plans and policies with respect to the controlled carrier." *TWA, Control by Hughes Tool Co.*, 12 C.A.B. 192, 196 (1951). The ICC requires complete information as to "the effect of the proposed transaction upon adequate transportation service to the public" (49 U.S.C. § 5(2)(c)), and it has recently conditioned a merger approval upon confining effects upon existing

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at n. 11 (1951), and cases cited). These agencies consider their "public interest" responsibility necessitates this information for the protection of the shipper and investor against absorption of excessive acquisition costs, *National Caribbean-Atlantic Control Case*, 6 C.A.B. 671, 677-680, 682 (1945), and to guard against premiums being paid for operating authority, *Acquisition of Marquette by TWA*, 2 C.A.B. 409, 413-13 (1940).

service facilities to those specified in the applicants' merger plan. See *Penn-Central Merger Case*, 389 U.S. 486, 501 (1968).

### 3. Protection of Displaced Employees of the Merging Carriers.

The Commission disowns any concern or responsibility for conditioning merger approval upon applicants' making adequate provision for employees who will be displaced as a result of the merger, considering this matter "a part of management discretion" (R.D. 43, p. 2). The Commission is concerned by the fact that it and its predecessors have never before ventured into the "area of labor management relations" (R.D. 43, p. 2). Of course, it can also be said that the Commission and its predecessors have never before specifically ventured into the area of approving carrier consolidations. Fifty years after the passage of the Shipping Act the Commission reaches for jurisdiction over carrier consolidations, but it does not want to disrupt "the integrity of the administrative process" by doing the whole job. (R.D. 43, p. 46, concurring opinion of Commissioner Fansen.)

True enough, there is no statutory provision for the Commission to consider employee protection, as there is in the case of the ICC (49 U.S.C. § 5(2)(c), (f)), but neither is there any statutory mandate for the Commission to embark upon the approval of carrier consolidations. However, there is clear precedent for this Commission to assert authority and responsibility for displaced employee protection under the "public interest" standard of Section 15 and its power to condition or modify agreements before approval.<sup>76</sup>

### 4. Other Factors.

Commissioner Hearn pointed to several other matters that the Commission was unable to evaluate because of the incomplete

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76. See *Oling v. Airline Pilots Association*, 346 F.2d 270, 274-75 (7th Cir. 1965), *certiorari denied*, 382 U.S. 926 (1965). The CAB was in the same position as this Commission, having no statutory authority to consider employee protection plans in merger cases, but the courts found such consideration a necessary incident of its merger jurisdiction.

record before it. These include the effect of the merger on subsidy recapture and value received for the subsidy dollar, the effect on commerce of decreased competition for MSTs cargo, whether the benefits to the merger applicants would be paralleled by concomitant service benefits, and the specific respects in which the merger would benefit development of a container program and acquisition of shore facilities in Japan (R.D. 43, pp. 53-54).

These and many other matters quite obviously would have been explored had the Commission followed the guidelines developed by the Interagency Committee on Transport Mergers discussed in Section A, above. They are the kinds of matters that the other regulatory agencies that do have merger jurisdiction routinely explore.

For purposes of the present discussion, it may be assumed that once the plan of merger and its consequences are fully developed, it can be demonstrated to serve the public interest. However, until such time as the record is fully developed, we fail to see how the Commission could adequately discharge its asserted jurisdiction to approve the instant merger and immunize it from the antitrust laws.<sup>77</sup>

### CONCLUSION

In view of the foregoing considerations, this Court should:

1. Enjoin, set aside and vacate the order here under review as invalidly entered in excess of the Commission's jurisdiction.
2. If contrary to Matson's contentions the Commission be held to have jurisdiction to approve the agreement as a merger agreement and immunize the merger from the antitrust laws, then enjoin, set aside and vacate the order here under review and

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77. It seems obvious that until the Commission had been fully informed, it could not discharged its obligation to weigh "the competitive effect against the asserted benefits to the community. . . . To weigh adequately one of these factors against the other requires a proper conclusion as to each." *United States v. Third National Bank in Nashville, et al.*, *supra* at 4178.

remand the matter to the Commission for it to take such further action as may be necessary to determine the lawfulness of the merger in the light of the applicable standards above discussed.

Respectfully submitted,

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#### **CERTIFICATE**

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules; and I further certify that I have examined the provisions of Rule 39 of said rules.

I further certify that I have this day served a copy of the foregoing brief on each party of record by mailing a copy thereof via first class mail, postage prepaid, to the attorney of record for each such party.

Dated at San Francisco, California this 15th day of April, 1968.

JOHN E. SPARKS

**(Appendix Follows)**





## *Appendix A*

The full text of Section 15, Shipping Act, 1916, as amended, (46 U.S.C. § 814) is as follows:

“Every common carrier by water, or other person subject to this chapter, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term ‘agreement’ in this section includes understandings, conferences, and other arrangements.

The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations. No such agreement shall be approved, nor shall continued approval be permitted for any agreement (1) between carriers not members of the same conference or conferences of carriers serving different trades that would otherwise be naturally competitive, unless in the case of agreements between carriers, each carrier, or in the case of agreements

between conferences, each conference, retains the right of independent action, or (2) in respect to any conference agreement, which fails to provide reasonable and equal terms and conditions for admission and readmission to conference membership of other qualified carriers in the trade, or fails to provide that any member may withdraw from membership upon reasonable notice without penalty for such withdrawal.

The Commission shall disapprove any such agreement, after notice and hearing, on a finding of inadequate policing of the obligations under it, or of failure or refusal to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints.

Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modifications, and cancellations shall be lawful only when and as long as approved by the Commission; before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation; except that tariff rates, fares, and charges, and classifications, rules, and regulations explanatory thereof (including changes in special rates and charges covered by section 813a of this title which do not involve a change in the spread between such rates and charges and the rates and charges applicable to non-contract shippers) agreed upon by approved conferences, and changes and amendments thereto, if otherwise in accordance with law, shall be permitted to take effect without prior approval upon compliance with the publication and filing requirements of section 817(b) of this title and with the provisions of any regulations the Commission may adopt.

Every agreement, modification, or cancellation lawful under this section, or permitted under section 813a of this title shall be excepted from the provisions of Sections 1-11 and 15 of Title 15, and amendments and Acts supplementary thereto.

Whoever violates any provision of this section or of section 813a of this title shall be liable to a penalty of not

more than \$1,000 for each day such violation continues, to be recovered by the United States in a civil action: *Provided, however,* That the penalty provisions of this section shall not apply to leases, licenses, assignments, or other agreements of similar character for the use of terminal property or facilities which were entered into before the date of enactment of this Act, and, if continued in effect beyond said date, submitted to the Federal Maritime Commission for approval prior to or within ninety days after the enactment of this Act, unless such leases, licenses, assignments, or other agreements for the use of terminal facilities are disapproved, modified, or canceled by the Commission and are continued in operation without regard to the Commission's action thereon. The Commission shall promptly approve, disapprove, cancel, or modify each such agreement in accordance with the provisions of this section."



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